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2504
No. 11775

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,

Appellants,

vs.

GENERAL INSURANCE COMPANY OF
AMERICA, a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

No. 11775

IN THE

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FOR THE NINTH CIRCUIT

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,

Appellants.

vs.

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TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Answer	7
Appeal:	
Notice of	33
Statement of Points on.....	37
Statement of Points on (Circuit Court).....	72
Stipulation and Order re Exhibits.....	39
Stipulation for Costs on.....	34
Application for Original Exhibits to Be Considered in Original Form Without Printing (Circuit Court)....	71
Certificate of Clerk.....	40
Complaint for Damages Under Title Insurance Con- tracts	2
Findings of Fact and Conclusions of Law.....	20
Judgment	28
Memorandum Decision	12
Minute Order Entered August 29, 1947.....	32
Motion for a New Trial, to Amend Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment	30

	Page
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	33
Notice of Entry of Judgment.....	29
Objections to Proposed Findings of Fact and Conclusions of Law.....	17
Reporter's Transcript of Proceedings.....	41
Plaintiffs' Exhibits (See Index to Exhibits)	
Defendant's Exhibit (See Index to Exhibits)	
Testimony on Behalf of Plaintiff:	
Gawecki, Laura—	
Direct examination	42
O'Rourke, Loraine—	
Direct examination	52
Cross-examination	57
Statement of Points on Appeal.....	37
Statement of Points on Appeal (Circuit Court).....	72
Stipulation and Order re Exhibits.....	39
Stipulation for Costs on Appeal.....	34

INDEX TO EXHIBITS

Plaintiffs' Exhibits:

No.	Page
1. Policy issued by General Insurance Company of America, No. 2737 F-7909 (In Evidence).....	43
2. Policy issued by Dubuque Fire & Marine Insurance Company, No. 1362125 (In Evidence).....	43
3. Escrow Instructions and Supplemental Escrow Agreement (In Evidence).....	45
4. Sworn statement in proof of loss made by Laura Gawecki addressed to General Insurance Company (In Evidence).....	47
5. Sworn statement in proof of loss made by Laura Gawecki addressed to Dubuque Fire & Marine Insurance Company (In Evidence).....	47
6. Agreement for submission to appraisers and the award of the appraisal agreement (In Evidence)	50
7. Release of mortgage (In Evidence).....	51
8. Lease entered into between Walter J. McCormick and Isabelle McCormick as landlands, and Laura Gawecki and Collette Mitre as tenants (For Identification)	52
9. Notice of appointment (In Evidence).....	57
10. Publication of notice of intended mortgage (In Evidence)	67
11. Notice of intended mortgage (In Evidence).....	67

Defendant's Exhibit:

A. Real chattel mortgage for the balance of the purchase price (In Evidence).....	63
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NAMES AND ADDRESSES OF ATTORNEYS:

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458 South Spring Street

Los Angeles 13, Calif.

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HINDMAN & DAVIS

607 South Hill Street

Los Angeles 14, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the
Southern District of California
Central Division
No. 5868-B

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,
Plaintiffs,

vs.

GENERAL INSURANCE COMPANY OF
AMERICA, a corporation,
Defendant.

COMPLAINT FOR DAMAGES UNDER FIRE
INSURANCE CONTRACT

Plaintiffs Complain and Allege:

I.

That at all times herein mentioned plaintiffs were partners doing business under the fictitious name of Skylark Cafe & Restaurant. That the plaintiffs were and are citizens of the State of California.

II.

That at all times herein mentioned defendant was and now is a corporation organized under and by virtue of the laws of the State of Washington, and was and now is a citizen of the State of Washington. [2]

III.

That the defendant was at all times herein mentioned engaged in the business of writing insurance under and

by virtue of the laws of the State of California pertaining to insurance companies.

IV.

That the amount in controversy herein, exclusive of interest and costs, is the sum of \$20,388.95.

V.

That the jurisdiction of this court is based upon the diversity of the citizenship of the parties hereto and the amount in controversy, exclusive of interest and costs, being in excess of \$3000.

VI.

That on or about the 10th day of July 1945, for a valuable consideration, defendant issued a fire insurance policy on the California standard form in which it insured furniture, fixtures and equipment usual to a restaurant, awnings and other personal property, as well as beers, wines, liquors, and property incidental to restaurant business of the plaintiffs located at 7519 Sunset Boulevard, Los Angeles, California, in the amount of \$35,500.

VII.

That on or about the 12th day of January 1946, and while said insurance policy hereinabove mentioned was in full force and effect, a fire occurred on the premises occupied by the plaintiffs, resulting in loss and damage to the property of the plaintiffs in the amount of \$26,880.23.

VIII.

That immediately thereafter plaintiffs gave written notice of said loss to defendant, and protected the property from further damage; separated the damaged and undamaged personal property and put it in the best possible order, and made a complete inventory, [3] stating the quantity and cost of each article and the amount claimed

thereon. That within 60 days after the commencement of the fire, the insured notified the defendant company, at its main office in California, by written statement, signed and sworn to, setting forth their knowledge and belief as to the origin of the fire, the interest of the insured and all others in the property, the cash value of the different articles or properties and the amount of loss thereon, all encumbrances thereon, all other insurance covering said articles, a copy of the description and schedules of all other policies, and all changes of title, use, occupancy, location, and possession of said property.

IX.

That following the receipt by defendant of the said sworn proof of loss hereinabove mentioned, defendant disagreed with the amount claimed therein and demanded of plaintiffs that they submit the question of the amount of loss and damage to an appraisal, and defendant named a competent and disinterested appraiser; whereupon and pursuant to said request for appraisal these plaintiffs named a competent and disinterested appraiser, and the two appraisers so selected nominated an umpire; and thereafter the two appraisers and the umpire did, on or about the 21st day of May 1946, agree in writing that the loss and damage to the property of the plaintiffs was the sum of \$26,880.23.

X.

That there was in existence at the time of the issuing of said policy of defendant a policy of insurance issued by the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, in the amount of \$12,500, making a total insurance on the property of the plaintiffs in the amount of \$48,000. That the insurance policy issued by the defendant company insured separately the food and liquor

of the plaintiffs, the loss to which under the appraisal agreement above mentioned was determined to be the sum of \$1953.70. That the pro [4] rata share of the balance of \$24,926.53, under the terms and conditions of the policy issued by the defendant, was $35.5/48 \times \$24,926.53$, making the total liability of the defendant under its policy of insurance the sum of \$20,388.95.

XI.

That at the time of the issuing of said policy the plaintiffs were not the sole and unconditional owners of the personal property located at 7519 Sunset Boulevard, but there was at the time of the issuing of said policy in full force and effect a chattel mortgage on said property issued by plaintiffs to Walter J. McCormick and Edward A. Matlin, which fact was known to the agents of the defendant at the time of the issuing of said policy. That said property insured by defendant at 7519 Sunset Boulevard was further subject to a lien in favor of Leo Kanner and Bertha Kanner, owners of the building at 7519 Sunset Boulevard, for the payment of rents due said owners from these plaintiffs, a fact which was known to the agents of defendant at the time of the writing of said contract of insurance.

XII.

That said mortgage issued to the said Walter J. McCormick and Edward A. Matlin, and said lien in favor of Leo Kanner and Bertha Kanner have heretofore been satisfied, and the plaintiffs are now entitled to all amounts due under said policy.

XIII.

That there is now due and owing from the defendant to the plaintiffs the sum of \$20,388.95, and although

demand has been made upon the defendant for said sum, no part thereof has been paid.

XIV.

That plaintiffs are informed and believe and upon such information and belief allege that the defendant has refused payment of the amount due and owing to the plaintiffs under the policy [5] of insurance because of a provision in said policy, viz.:

“This entire policy shall be void if the interest of the insured be other than unconditional and sole ownership.”

XV.

That the defendant, with full knowledge of the fact that the interest of the plaintiffs was not that of sole and unconditional ownership, after the fire required plaintiffs to submit to an examination under oath, required plaintiffs to submit their loss to an appraisal, and has not at any time cancelled said policy or the remainder thereof and has retained the entire premium for said policy, and has waived that portion of the terms and conditions of said policy which require the interest of the insured to be unconditional and sole ownership.

Wherefore, plaintiffs pray judgment against defendant in the sum of \$20,388.95, together with interest thereon at the rate of 7 per cent per annum from the 21st day of May 1946; for costs herein expended; and for such other and further relief as to the court may seem proper.

GEORGE PENNEY

Attorney for Plaintiffs [6]

[Verified.]

[Endorsed]: Filed Oct. 17, 1946. Edmund L. Smith, Clerk. [7]

[Title of District Court and Cause]

ANSWER

Comes now defendant and for Answer to Plaintiffs' Complaint:

I.

As to the allegations of Paragraph VI of plaintiffs' complaint, defendant admits it insured plaintiff Laura Gawecki, doing business as the Skylark Restaurant, against all loss of damage by fire, except as provided, to an amount not exceeding \$35,500.00 from the 28th day of June, 1945, to the 28th day of June, 1948, by a written policy of insurance, insuring the property described as furniture, fixtures and equipment usual to a restaurant; and on beers, wines and liquors not to exceed 25% of the amount of insurance, all only while situate 7519 Sunset Boulevard, Los Angeles, California, and denies the [8] balance of the allegations of said Paragraph VI and each and every allegation, matter, and thing therein contained.

II.

As to the allegations of Paragraph VII of said complaint, defendant admits the same, except that defendant states that it is without knowledge and information sufficient to form a belief as to the truth of plaintiffs' averment that the loss and damage to the property of plaintiffs was in the amount of \$26,880.23.

III.

As to the allegations of Paragraph X of plaintiffs' complaint, defendant admits that there was in existence at the time of the issuing of defendant's policy a policy

of insurance issued by the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, in the amount of \$12,500, making a total insurance on the property of plaintiffs in the amount of \$48,000, and denies the balance of the allegations in said Paragraph X contained, and each and every other allegation, matter, and thing in said paragraph contained, and particularly denies that the liability of defendant under its policy was in the sum of \$20,388.95, or in any other sum at all.

IV.

As to the allegations of Paragraph XI of plaintiffs' complaint, defendant admits said allegations, except that defendant denies that the facts alleged in said Paragraph XI were known to the agents of the defendant at the time of issuing of said policy or at the time of the writing of said contract of insurance, or at any other time prior to the loss by fire alleged in the complaint.

V.

As to the allegations of Paragraph XII of plaintiffs' complaint, defendant denies that the plaintiffs are now entitled to all or any amount due under said policy, and deny that all or any amount are or were at the time of the commencement of the foregoing-entitled action, or at all, due under said policy; and as to the balance of the [9] *of the* allegations of said Paragraph XII defendant states that it is without knowledge or information sufficient to form a belief as to the truth of said averments.

VI.

As to the allegations of Paragraph XIII of plaintiffs' complaint defendant denies that there is now or was at the time of the commencement of the foregoing-entitled action, or at any other time, or at all, due and owing from defendant to plaintiffs the sum of \$20,388.95, or any other sum at all.

VII.

As to the allegations of Paragraph XIV of plaintiffs' complaint defendant admits that defendant has and does deny liability to plaintiff Laura Gawecki for, among other reasons, the breach of the conditions of the policy of insurance set forth in said Paragraph XIV.

VIII.

As to the allegations of Paragraph XV of plaintiffs' complaint defendant denies that it has retained the entire premium for said policy, and alleges that Laura Gawecki has never cancelled said policy or demanded or requested a return of any of the premium, and denies that defendant has waived that portion of the terms and conditions of said policy which require the interest of the assured to be unconditional and sole ownership, and denies that defendant has waived any of the terms or conditions of said policy.

Further Pleading and as a Further and Separate Defense to Plaintiffs' Complaint, Defendant Alleges:

I.

That in the policy of insurance referred to in plaintiffs' complaint, which policy is in the form provided by the

State of California, and known as the "California Standard Form Fire Insurance Policy," it was provided:

"Unless otherwise provided by agreement endorsed hereon or added hereto this entire [10] policy shall be void, * * * if the interest of the insured be other than unconditional and sole ownership, * * *"

but the policy pleaded in plaintiffs' complaint insured Laura Gawecki, doing business as Skylark Restaurant, against loss by fire, and at the time of the loss by fire alleged in plaintiffs' complaint to the property described in said policy of insurance the said Laura Gawecki was not the sole and unconditional owner of said property, but owned and held said property jointly with plaintiff Collette Mitre, and said condition of said policy was not waived by agreement endorsed upon said policy or added thereto, or in any other manner, or at all, and it was not provided otherwise than that the ownership of the insured in said policy of the property described therein should be other than unconditional and sole ownership.

Further Pleading, and as a Second, Further, and Separate Defense to Plaintiffs' Complaint, Defendant Alleges:

I.

That in the policy of insurance pleaded in plaintiffs' complaint, which policy was on the form known as California Standard Form Fire Insurance Policy, as provided for by the State of California, it was provided as follows:

"Unless otherwise provided by agreement in writing endorsed hereon or added hereto this company

shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage.”

II.

That at the time of the loss or damage to the property described in said policy of insurance and in plaintiffs' complaint all of the property therein described was encumbered by chattel mortgages, one executed by plaintiffs herein to Walter J. McCormick and Edward A. Matlin, and another executed by former owners of the property to Leo [11] Kanner and Bertha Kanner.

Wherefore, defendant prays that plaintiffs take nothing by their complaint and that defendant go hence and have and recover its costs and disbursements herein.

E. EUGENE DAVIS

HINDMAN & DAVIS

By E. Eugene Davis

Attorneys for Defendant

607 South Hill Street

Los Angeles 14, California [12]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 19, 1946. Edmund L. Smith, Clerk. [13]

In the District Court of the United States
Southern District of California
Central Division

Honorable Leon R. Yankwich, Judge

No. 5869-Y

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,

Plaintiffs,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-
PANY OF DUBUQUE, IOWA, a corporation,
Defendant.

No. 5868-Y

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,

Plaintiffs,

vs.

GENERAL INSURANCE COMPANY OF
AMERICA, a corporation,

Defendant.

MEMORANDUM DECISION

The above-entitled causes, heretofore tried, argued and submitted, are now decided as follows:

It Is Ordered, Adjudged and Decreed that: [14]

(1) In Cause No. 5868-Y, the plaintiffs take nothing against the defendant General Insurance Company of America, a corporation, and that the said defendant do

have and recover from the plaintiffs its costs and disbursements therein.

(2) In Cause No. 5869-Y, the plaintiffs take nothing against the defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, and that the said defendant do have and recover from the plaintiff its costs and disbursements therein.

I am of the view that the plaintiffs are not entitled to recover in either case. The defendants in their Answer pleaded the violation of a clause of the fire insurance policy relating to unconditional and sole ownership. For a while, and until the cause was fully argued, I believed that this was the only issue. Had this been so, the plaintiffs would have been entitled to recover, under those cases which hold that only a positive concealment of the facts as to ownership is a defense, and that where no inquiry is made as to ownership, the principle does not apply. (Dunn v. Phoenix Insurance Co., 1931, 113 C. A. 256; Ames v. Employer's Casualty Co., 1936, 16 C. A. (2) 254; Kahn v. Commercial Union Fire Insurance Co., 1936, 16 C. A. (2) 42.) However, the defendants have raised a more fundamental question, violation of the provision relating to chattel mortgages. This provision is made mandatory by the law of California (California Insurance Code, Secs. 2070-2071). As interpreted by the courts of California, the effect of this provision is to suspend fire insurance policy while the chattel mortgage is on the property. There was no disclosure of its existence or waiver of the condition by either company under the terms of the clause of each policy. This brings the case under [15] the rule declared in such cases as Hargett v. Gulf Insurance Company, 1936, 12 C. A. (2) 449 and cases therein cited, dating back to Steil v. Sun Insurance Company, 171 C.

795, decided in 1916, and which has been followed ever since. See also, *Cinema Schools v. Westchester Fire Insurance Co.*, 1932, D. C. Cal., 1 Fed. Sup. 37, and *Cinema Schools v. Federal Union Insurance Co.*, 1932, D. C. Cal., 1 Fed. Sup. 42, both decided by Judge John Knox of the Southern District of New York, while sitting in this district. (See also, *Sun Insurance Office v. Scott*, 1931, 284 U. S. 77.) There has been no waiver of this condition by any agent of either company authorized to make such waiver. (See the above cases and the opinion of our later colleague Ralph E. Jenney, in *Alexander v. General Insurance Co., of America*, 1938, D. C. Calif., 22 Fed. Sup. 157.)

So far as the General Insurance Company is concerned, this point was left without any doubt at the time of the trial. As to the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, there was some question as to whether the knowledge of the person, Mrs. O'Rourke, who secured the insurance, was transmitted to the Company through Mr. Myer Pransky. But, in view of the stipulation contained in the letter which has been filed since the trial, I am of the view that Mr. Pransky merely having authority to solicit insurance and not having authority to issue or countersign policies, could not bind the company by knowledge which he acquired as to the existence of the mortgage. And what is more, such mere knowledge without more was not effective as a waiver of the condition. For the policies distinctly provided for the only manner of waiving conditions in them. (See, *Wilson v. Maryland Casualty Co.*, 1937, 19 Cal. App. (2) 463.) [16]

After the cause had been submitted, it was reopened at the request of the plaintiffs for the purpose of allowing

proof of compliance with Section 3440 of the Civil Code of California. This is the familiar section which requires a seven-day notice of intended sale or mortgage of stock in trade, fixtures, or equipment, and publication of such notice at least once during the seven-day period, to be completed not less than two days before the date of the sale or mortgage.

The object of this section is to protect the creditors against surreptitious sale or encumbrance of the stock in trade of a merchant, or the fixtures or equipment of a cafe owner on the basis of the ownership of which they may have extended credit. (See my opinion in *re Mercury Engineering Company*, 1946, D. C. Cal., 68 Fed. Sup. 376, 379.)

The chattel mortgage was dated July 7, 1945. It was recorded August 22, 1945. The notice of intention to mortgage was dated June 15, 1945, and was recorded at 3:21 o'clock P. M. of that day. Publication was made in the *Independent-Review*, a newspaper of general circulation, in its issue of June 15, 1945.

So we have full compliance with the requirement of Section 3440. But this cannot be of any assistance to the plaintiffs. The rights of the defendants, so far as the existence or non-existence of the mortgage is concerned, are not those of general creditors covered by this section. They are contractual. They stem from the contract of insurance. And the policies embodying such contract contain the following clause:

"Chattel mortgage. Unless otherwise provided by agreement in writing endorsed [17] hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability

of the company upon other property hereby insured shall not be affected by such chattel mortgage.”

So this clause says specifically that “unless otherwise provided by agreement in writing, endorsed hereon or added hereto,” the insurance company shall not be liable, under the policy, for loss or damage of the property insured “while encumbered by chattel mortgage.”

This suspension of liability is, therefore, effective unless the company through its authorized agent with actual knowledge of the existence of the chattel mortgage, has waived the condition. As already appears, there was no such waiver. And the notice under Section 3440 of the California Civil Code cannot take the place of the required actual waiver.

It is to be regretted that there is no method of compensating the plaintiffs for the undisputed loss they sustained through the fire. But, as the contracts were of their own making, and in the form made mandatory by the statutes of California, we cannot create liability where none exists.

Hence the rulings above made.

Dated this 6th day of August, 1947.

LEON R. YANKWICH

Judge [18]

Appearances:

For the Plaintiffs: George Penney, Esq.

For the Defendant General Life Insurance Company:
E. Eugene Davis, Esq.

For the Defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa: Angus C. McBain, Esq.

[Endorsed]: Filed Aug. 6, 1947. Edmund L. Smith,
Clerk. [19]

[Title of District Court and Cause]

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the plaintiffs, by their attorney George Penney, and object to the Proposed Findings of Fact and Conclusions of Law heretofore submitted by the defendant's attorneys in the following particulars:

I.

Plaintiffs object to the findings in paragraph XI of said proposed findings of fact and request that the court specifically find that at no time were the plaintiffs delinquent in the payment of rents and that the chattel mortgage lien in favor of Walter J. McCormick and Isabel McCormick was never a chattel mortgage lien contemplated by the policy. The plaintiffs further request that the court specifically find that at the time of the issuing of the policy of insurance the soliciting agent L. O'Rourke [20] knew of the existence of both the chattel mortgage given to Edward A. Matlin as well as the chattel mortgage lien to Walter J. McCormick and Isabel McCormick for rent, but that said agent was a soliciting agent and not a general agent of said company; and that the court further find that the said chattel mortgages were recorded on the 22nd day of August 1945 in the office of the County Recorder of the County of Los Angeles and that the agents of the defendant company had constructive notice of the existence of the chattel mortgages at all times thereafter.

II.

Plaintiffs object to the findings set forth in paragraph XII of said proposed findings of fact and request that the

court specifically find that the chattel mortgage lien in favor of Walter J. McCormick and Isabel McCormick was not a chattel mortgage contemplated by the terms and conditions of said policy of insurance written by the defendant company, as there was no delinquency in the payment of rents at any time during the term of said insurance policy.

III.

Plaintiffs object to the findings set forth in paragraph XIII of said proposed findings of fact and request the court to specifically find that the plaintiffs had an insurable interest in said property and that no evidence was introduced to prove the extent of the respective interests of the two plaintiffs herein, as no issue was raised concerning said point during the course of said trial.

IV.

Plaintiffs object to the findings set forth in paragraph XIV of said proposed findings of fact, in the second paragraph thereof, and request the court to specifically find that at the time of the request for appraisal and examination under oath the defendant, through its adjusting representatives Dauerty & Dauerty, [21] had been apprised of the fact that there was a chattel mortgage in existence at the time of the fire in favor of Edward A. Matlin, said information having been conveyed to the adjusting representatives by the plaintiffs' sworn proof of loss; and, further, that the soliciting agent of the defendant company L. O'Rourke knew of the

existence of said chattel mortgage at all times before and after the issuing of said policy.

V.

Plaintiffs object to the findings set forth in the second paragraph of paragraph XVIII of said proposed findings of fact upon the grounds that L. O'Rourke, soliciting agent of the General Insurance Company, defendant herein, had notice and knowledge of the chattel mortgage issued to Edward A. Matlin and Walter J. McCormick and Isabel McCormick; further, that the plaintiffs did disclose to L. O'Rourke the existence of the chattel mortgage in favor of Edward A. Matlin and Walter J. McCormick and Isabel McCormick and that the plaintiffs at no time ever made any false representations concerning the extent of their ownership or the existence of any chattel mortgage.

Respectfully submitted,

GEORGE PENNEY

Attorney for Plaintiffs [22]

[Affidavit of Service by Mail.]

[Written]: Objections considered and overruled.

LRY, J.

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [23]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial before the Honorable Leon R. Yankwich, Judge of the above-entitled court; and plaintiffs appeared in person and by their attorney, George Penney, and defendant appeared by its attorneys, Hindman & Davis by E. Eugene Davis, and both plaintiffs and defendant having introduced evidence in support of their respective causes and defenses, and the matter having been duly submitted to the court for decision, and all and singular the law and the facts being by the court fully considered and understood, the Court doth now, on motion of defendant, make its Findings of Fact, as follows, to-wit:

FINDINGS OF FACT

I.

That at all times herein mentioned plaintiffs were partners doing business under the fictitious name of Skylark Cafe & Restaurant. That the plaintiffs were and are citizens of the State [24] of California.

II.

That at all times herein mentioned defendant was and now is a corporation organized under and by virtue of the laws of the State of Washington, and was and now is a citizen of the State of Washington.

III.

That the defendant was at all times herein mentioned engaged in the business of writing insurance under and by virtue of the laws of the State of California pertaining to insurance companies.

IV.

That the amount in controversy herein, exclusive of interest and costs, is the sum of \$20,388.95.

V.

That the jurisdiction of this court is based upon the diversity of the citizenship of the parties hereto and the amount in controversy, exclusive of interest and costs, being in excess of \$3000.00.

VI.

That defendant, by written contract of insurance, in form of California Standard Fire Insurance Policy, insured plaintiff Laura Gawecki, doing business as Skylark Restaurant, against all loss or damage by fire, except as provided, to an amount not exceeding \$35,500.00 from the 28th day of June, 1945, to the 28th day of June, 1948, to the property described as furniture, fixtures and equipment usual to a restaurant, and on beers, wines and liquors not to exceed 25% of the amount of insurance, all only while situate 7519 Sunset Boulevard, Los Angeles, California.

VII.

That on or about the 12th day of January, 1946, a fire occurred to the premises described in said policy resulting in a loss [25] and damage to the property described in said contract of insurance in an amount of \$26,880.23. That said policy was not in full force and effect at the time of said fire as more fully appears from the findings hereinafter made.

VIII.

That immediately thereafter plaintiffs gave written notice of said loss to defendant, and protected the property

from further damage; separated the damaged and undamaged personal property and put it in the best possible order, and made a complete inventory, stating the quantity and cost of each article and the amount claimed thereon. That within 60 days after the commencement of the fire, the insured notified the defendant company, at its main office in California, by written statement, signed and sworn to, setting forth their knowledge and belief as to the origin of the fire, the interest of the insured and all others in the property, the cash value of the different articles or properties and the amount of loss thereon, all encumbrances thereon, all other insurance covering said articles, a copy of the description and schedules of all other policies, and all changes of title, use, occupancy, location, and possession of said property.

IX.

That following the receipt by defendant of the said sworn proof of loss hereinabove mentioned, defendant disagreed with the amount claimed therein and demanded of plaintiffs that they submit the question of the amount of loss and damage to an appraisal, and defendant named a competent and disinterested appraiser; whereupon and pursuant to said request for appraisal these plaintiffs named a competent and disinterested appraiser, and the two appraisers so selected nominated an umpire; and thereafter the two appraisers and the umpire did, on or about the 21st day of May, 1946, agree in writing that the loss and damage to said property was in the sum of \$26,880.23. [26]

X.

That there was in existence at the time of the issuing of said policy of defendant a policy of insurance issued

by the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, in the amount of \$12,500, making a total insurance on the property of the plaintiffs in the amount of \$48,000. That the insurance policy issued by the defendant company insured separately the food and liquor of the plaintiffs, the loss to which under the appraisal agreement above mentioned was determined to be the sum of \$1953.70.

That no finding of the prorata share of either of the said insurance companies is made, as it was stipulated that in event the court found against either or both of said insurance companies their respective proportions would be determined by agreement.

XI.

That at the time of the issuing of said policy the plaintiffs were not the sole and unconditional owners of the personal property located at 7519 Sunset Boulevard, and there was at the time of the issuing of said policy in full force and effect a chattel mortgage on said property issued by plaintiffs to Walter J. McCormick and Edward A. Matlin. That said property insured by defendant at 7519 Sunset Boulevard was further subject to a chattel mortgage lien in favor of Leo Kanner and Bertha Kanner, owners of the building at 7519 Sunset Boulevard, for the payment of rents due said owners from these plaintiffs. That neither at the time of the issuance and delivery of said policy of insurance nor at any other time, nor at all, prior to the investigation after the loss and damage by fire to said property was defendant, or any of its agents, apprised of or had any knowledge of the execution, delivery, or existence of said chattel mortgages, or of either of them.

XII.

That each and both of said chattel mortgages and the liens created thereby were in full force and effect at the time of said [27] fire, to-wit, on January 12, 1946, and were not paid, released, or discharged until long after said fire.

XIII.

That the foregoing-referred-to policy of insurance insured Laura Gawecki, doing business under the fictitious name of Skylark Cafe and Restaurant. That said property described in said policy of insurance was owned jointly by plaintiffs Laura Gawecki and Collette Mitre, and said policy insured only Laura Gawecki, doing business as Skylark Restaurant against loss by fire, and said Laura Gawecki was not the sole and unconditional owner of the property described in said policy inasmuch as the said Collette Mitre had an interest therein. That no evidence was introduced to prove the extent of the respective interests of the two plaintiffs herein.

XIV.

That after said fire defendant required plaintiffs to submit to an examination under oath as required by the terms of said policy, demanded an appraisal as provided for in said policy, and did not cancel said policy, and has not returned to plaintiffs, or either of them, any premium or unearned premium thereon.

The court further finds that at the time of the requirement for appraisal and examination under oath, the defendant or any of its agents, had no knowledge or information of the lack of sole and unconditional ownership of plaintiff Laura Gawecki in the property described in said policy, and had no knowledge or information of said chattel mortgages, or any of them.

The court further finds that neither of said plaintiffs has ever requested a cancellation of said policy from defendant or demanded a return of the premium thereon, or of any part thereof.

XV.

The court further finds that the policy of insurance referred to herein was in strict accordance with the form as required by the Insurance Code of the State of California, known as the California [28] Standard Form of Fire Insurance Policy, and, among other conditions, provided as follows, to-wit:

“Unless otherwise provided by agreement endorsed hereon or added hereto this entire policy shall be void, * * * if the interest of the insured be other than unconditional and sole ownership, * * *.”

And said policy further provided as follows:

“Unless otherwise provided by agreement in writing endorsed hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage.”

XVI.

That said policy, among other things, further provided:

“Non-waiver by appraisal or examination. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage or by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.”

XVII.

That there was no agreement in writing, or otherwise, endorsed upon said policy or added thereto, and no agreement, either oral or written, of any kind providing otherwise than in the said foregoing-quoted provisions of said policy.

XVIII.

The court further finds that at the time of the loss or damage to the property described in said policy of insurance and in [29] plaintiffs' complaint, all of the property therein described was encumbered by chattel mortgages, one executed by plaintiffs herein, as mortgagors, to Edward E. Matlin, as mortgagee, which chattel mortgage became in full force and effect on July 7, 1945, and was in full force and effect at all times thereafter until long after the fire of January 12, 1946; and said property was also, commencing on July 7, 1945 and in full force and effect at all times thereafter until long after the occurrence of the fire and loss and damage thereby to the property, further encumbered by a chattel mortgage executed and delivered by plaintiffs as mortgagors to Walter J. McCormick and Isabelle McCormick, as mortgagees, mortgaging an undivided one-third interest in and to all of said property.

And the court further finds that neither at the time of the execution and delivery of said policy nor at the time of said fire and loss and damage thereby on January 12, 1946, or at any other time, or at all, until after said fire and an investigation thereof, did defendant, or any of its agents, have any notice or knowledge of said chattel mortgages, or of either of them, or of the lack of sole and unconditional ownership of said property

in the insured Laura Gawecki, and that neither of said plaintiffs ever at any time prior to said investigation of said loss after said fire made any representations or disclosures to defendant, or any of its agents, concerning said chattel mortgages, or either of them, or of the nature and extent of the interest or ownership of plaintiffs or either of them in and to the property described in said policy of insurance.

Wherefore, applying the existing law to the foregoing Findings of Fact, the court makes the following

CONCLUSIONS OF LAW

I.

That plaintiffs are not entitled to judgment against defendant in any sum, and that defendant is entitled to judgment against plaintiffs, that it go hence without day, and have and [30] recover its costs and disbursements herein.

Done in open court this 19th day of August, 1947.

LEON R. YANKWICH

District Judge

Approved as to Form under Rule 7.

Attorney for Plaintiffs

Disapproved as to Form.

GEORGE PENNEY

Attorney for Plaintiffs

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [31]

In the United States District Court for the
Southern District of California
Central Division
No. 5868-Y Civil

LAURA GAWECKI and COLLETTE MITRE, dba
SKYLARK CAFE & RESTAURANT,
Plaintiffs,

vs.

GENERAL INSURANCE COMPANY OF
AMERICA, a corporation,
Defendant.

JUDGMENT

This cause having come on for trial before the Honorable Leon R. Yankwich, Judge of the above-entitled court, and plaintiffs having appeared in person and by their attorney, and defendant appearing by its attorneys, Hindman & Davis, by E. Eugene Davis, and the Court having heard evidence oral and documentary in support of the respective cause and defense, and the cause having been submitted, and the Court having heretofore rendered his decision and made Findings of Fact and Conclusions of Law herein, doth now, On Motion of defendant, Order, Adjudge and Decree that plaintiffs take nothing by their Complaint, and that defendant go hence and have and recover its costs and disbursements herein to be taxed by the Clerk at \$.....

Done in open court this 19th day of August, 1947.

LEON R. YANKWICH

District Judge

Approved as to Form under Rule No. 7.

GEORGE PENNEY

Attorney for Plaintiffs

Judgment entered Aug. 19, 1947. Docketed Aug. 19, 1947. C. O. Book 44, page 710. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [32]

[NOTICE OF ENTRY OF JUDGMENT]

Room 231, Federal Building

Los Angeles 12, California

August 19, 1947

George Penney, Esq.
939 Rowan Building
Los Angeles 13, Calif.
(plfs)

Hindman & Davis, Esqs.
607 So. Hill Street
Los Angeles 14, Calif.
(dft)

Re: Laura Gawecki et al. vs.
General Insurance Company etc.
No. 5868-Y Civil

Gentlemen:

This is to inform you that today, August 19, 1947, Judge Leon R. Yankwich signed and there was filed in above case, Findings of Fact and Conclusions of Law; Judgment; and Objections to Proposed Findings etc.

The Objections to Proposed Findings etc., have endorsed upon the face page "Objections considered and overruled. LRY/J."

The Judgment has been filed and entered in Civil Order Book 44 at page 710, as of August 19, 1947.

Very truly yours,

EDMUND L. SMITH

Clerk

By John A. Childress

Deputy [33]

[Title of District Court and Cause]

MOTION FOR A NEW TRIAL, MOTION TO
AMEND FINDINGS OF FACT AND CONCLU-
SIONS OF LAW AND DIRECT THE ENTRY
OF A NEW JUDGMENT

Come now the plaintiffs, by their attorney George Penney, and file this their written motions as follows, to wit:

Their Motion for New Trial in the Above-Entitled Matter.

Said motion is based upon the following grounds, and each of them:

1. That errors of law appear upon the face of the record.
2. That it appears from the pleadings and evidence in this case that an erroneous judgment has been rendered.
3. That it is manifest from the pleadings and evidence in this case that justice has not been attained by the judgment rendered therein.
4. That the findings of fact are not supported by the evidence. [34]

5. That the judgment is not supported by the evidence.

6. That the findings of fact are insufficient to support the conclusions of law.

7. That the findings of fact and conclusions of law are insufficient to support the judgment rendered therein.

8. That the conclusions of law are insufficient to support the judgment rendered therein.

Their Motion to Amend Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment in the Above-Entitled Matter.

Said motion is based upon the following grounds, and each of them:

1. That it appears from the pleadings and the evidence in this case that the court should have found that the plaintiffs were entitled to judgment against the defendant.

2. That it appears from the pleadings and the evidence in this case that the plaintiffs were without fault and that the defendant is estopped from denying liability under the terms and conditions of the insurance policy issued by it to the plaintiffs.

3. That the judgment in the above-entitled matter should have been in favor of the plaintiffs and against the defendant.

Said motions and each and all of them will be based upon the files, records, documents, evidence, including reporter's transcript and exhibits received in evidence, and

memoranda of counsel heretofore filed in the above-entitled action.

Dated, this 25th day of August, 1947.

GEORGE PENNEY

Attorney for Plaintiffs [35]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 25, 1947. Edmund L. Smith, Clerk. [36]

[Minutes: Friday, August 29, 1947]

Present: The Honorable Leon R. Yankwich, District Judge.

Laura Gaweckie, et al. vs. Gen'l Ins. Co. of America. No. 5868-Y Civil.

Laura Gaweckie, et al. vs. Dubuque Fire & Marine Ins. Co. No. 5869-Y Civil.

(Same Order in Each Case):

For hearing motions of plaintiffs filed Aug. 25, 1947, (1) for new trial, (2) to amend Findings and Conclusions, and (3) for entry of new judgment; Geo. Penney, Esq., for plaintiffs; E. Eugene Davis, Esq., for defendant Gen. Ins. Co. in Case No. 5868; Angus C. McBain, Esq., for defendant Dubuque Fire & Marine Ins. Co., Case No. 5869;

Attorney Penney argues in support of motions.

Court makes a statement and denies all the said motions. [37]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Defendant Above Named, and to Its Attorneys
Hindman & Davis:

Notice Is Hereby Given That Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, plaintiffs in the above-entitled action, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the within action on the 19th day of August 1947, and from the order of the court in said action denying plaintiffs' motion for new trial, motion to amend the findings of fact and conclusions of law and direct the entry of a new judgment, and motion to correct findings.

Dated: October 7, 1947.

GEORGE PENNEY and

ROBERT M. NEWELL

By GEORGE PENNEY

Attorneys for Plaintiffs

[Endorsed]: Filed & mld. copy to Hindman & Davis, attys. for deft. Oct. 7, 1947. Edmund L. Smith, Clerk. [38]

In the District Court of the United States for the
Southern District of California
Central Division
No. 5868-Y Civil

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,

Plaintiffs,

vs.

GENERAL INSURANCE COMPANY OF
AMERICA, a corporation,

Defendant.

STIPULATION FOR COSTS

Know All Men By These Presents, That we, Laura Gaweckie and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, as Principals, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and authorized to act as surety under the Act of Congress approved August 13, 1894, whose principal office is located in Baltimore, Maryland, as Surety, are held and firmly bound unto the General Insurance Company of America, a corporation, in the full and just sum of Two Hundred Fifty and No/100 Dollars (\$250.00), lawful money of the United States, to be paid to the said General Insurance Company of America, a corporation, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The Condition of This Obligation Is Such, that

Whereas, the above named Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, Plaintiffs herein, have appealed, or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in favor of the Defendant in [39] the above entitled Court and in the above entitled action on or about the 19th day of August, 1947.

Now, Therefore, in consideration of the premises and of such appeal, if the said Plaintiffs, Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, shall prosecute their appeal to effect, and pay all costs that may be adjudged against them or either of them if the appeal is dismissed or the judgment is modified, then the above obligation to be void; otherwise to remain in full force and virtue, and in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten (10) days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 15th day of September, 1947.

SKYLARK CAFE & RESTAURANT

By Laura Gawecki

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

By Robert Hecht—Attorney in Fact

Attest S. M. Smith—Agent

State of California—County of Los Angeles—ss:

On this 15th day of September, 1947, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert Hecht, known to me to be the Attorney-in-Fact, and S. M. Smith, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

THERESA FITZGIBBONS

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires May 3, 1950.

Examined and recommended for approval as provided in Rule 8. Angus C. McBain, Attorney; George Penney.

Approved this 7 day of Oct., 1947. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Edw. F. Drew, Deputy.

The premium charged for this bond is \$10.00 per annum.

[Endorsed]: Filed Oct. 7, 1947. Edmund L. Smith, Clerk. [40]

[Title of District Court and Cause]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY IN THE APPEAL IN THIS CASE

I.

That the findings of fact do not support the conclusions of law or judgment in said case in that:

- A. The plaintiffs sustained an actual loss which was intended to be covered under the insurance policy issued by the defendant.

II.

That the judgment is contrary to law in that:

- A. The defendant by its actions has waived the terms and conditions of said insurance policy which provide that the interest of the insured be sole and unconditional; [41]
- B. The defendant by its actions has waived the provision requiring a chattel mortgage endorsement on said policy while the property is encumbered by a chattel mortgage;
- C. The defendant is estopped from setting up as a defense that the interest of the insured was other than sole and unconditional ownership;
- D. The defendant is estopped from setting up as a defense that the insurance policy did not have an endorsement clause while said property was encumbered by a chattel mortgage;

- E. Said judgment is contrary to the applicable laws of the State of California and of the United States of America.

III.

That the evidence is insufficient to sustain the findings of fact of the trial court.

IV.

That the trial court erred in denying plaintiffs' motion for a new trial.

V.

That the court erred in denying plaintiffs' motion to amend findings of fact and conclusions of law and direct the entry of a new judgment.

VI.

That the court erred in denying plaintiffs' motion to correct the findings.

Dated: October 7, 1947.

GEORGE PENNEY &
ROBERT M. NEWELL

By Geoerge Penney

Attorneys for Plaintiffs [42]

Received copy of the within Statement of Points this 7th day of October, 1947. Hindman & Davis, J. Hanson, Attorneys for Defendant.

[Endorsed]: Filed Oct. 7, 1947. Edmund L. Smith, Clerk. [43]

[Title of District Court and Cause]

STIPULATION

It Is Hereby Stipulated by and between plaintiffs and defendants, through their respective attorneys George Penney and Robert M. Newell and Hindman & Davis, that the original exhibits in the above-entitled action may be sent to the Clerk of the Circuit Court of Appeals and that the court may enter an order directing the Clerk of the United States District Court to forward the original exhibits to the Clerk of the Circuit Court of Appeals.

Dated: October 21, 1947.

GEORGE PENNEY &
ROBERT M. NEWELL

By George Penney
Attorneys for Plaintiffs

HINDMAN & DAVIS

E. Eugene Davis
Attorneys for Defendant [47]

ORDER

In accordance with the foregoing stipulation, the Clerk is hereby ordered and directed to forward the original exhibits in the above-entitled action to the Clerk of the Circuit Court of Appeals in connection with the appeal in this action.

Oct. 22, '47.

PAUL J. McCORMICK
Judge

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith,
Clerk. [48]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 48, inclusive, contain full, true and correct copies of Complaint for Damages under Fire Insurance Contract; Answer; Memorandum Decision; Objections to Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Copy of Notice of Entry of Judgment; Motion for a New Trial; Motion to Amend Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment; Minute Order Entered August 29, 1947; Notice of Appeal; Stipulation for Costs; Statement of Points Upon Which Appellants Intend to Rely in the Appeal in this Case; Designation of Record on Appeal and Stipulation and Order for Transmission of Original Exhibits which, together with copy of Reporter's Transcript of proceedings on June 17, 1947 and Original Plaintiff's Exhibits 1 to 11, inclusive, and Original Defendant's Exhibits A and B, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$12.10 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 31 day of October, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke
Chief Deputy Clerk

[Title of Disfrict Court and Causes]

No. 5868-Y Civil No. 5869-Y Civil

Honorable Leon R. Yankwich, Presiding Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

June 17, 1947, Los Angeles, California

Appearances:

For the Plaintiffs: George Penney.

For Defendant General Insurance Co. Hindman & Davis, by Eugene Davis, 607 Consolidated Bldg., Los Angeles, Calif. VA-0701.

For Defendant Dubuque Fire & Marine Insurance Co.: Angus C. McBain, 639 So. Spring Street, Los Angeles, Calif. VA-1303.

Los Angeles, California, Tuesday, June 17, 1947,
10:00 A. M.

The Court: Cases No. 5868-Y Civil and No. 5869-Y Civil.

Mr. Penney: We are ready on behalf of the plaintiffs in both cases.

Mr. Davis: On behalf of the defendant General Insurance Company we are ready.

Mr. McBain: The defendant Dubuque Fire & Marine Insurance Company is ready.

The Court: These cases are consolidated for trial. I assume we can mark all the exhibits in one case, and take all the testimony in one case, and add such additional matters as may be peculiar to the other case.

Mr. Penney: That is satisfactory.

Mr. McBain: Yes.

Mr. Davis: Satisfactory.

The Court: Let us take the lowest number, 5868—the General Insurance Company case.

(Statements by counsel.)

LAURA GAWECKI,

called as a witness by and on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Laura Gawecki.

Mr. Penney: Mr. McBain, I note in your answer that you [2] have denied the existence of the fictitious name of the plaintiffs here as Skylark Cafe & Restaurant. It is admitted in the answer of the defendant General Insurance Company.

Mr. McBain: That is a matter of form. There is no issue.

Mr. Davis: We don't think it makes any difference.

Direct Examination

By Mr. Penney:

Q. Your name is Laura Gawecki?

A. Yes, sir.

Q. And you are the plaintiff in this action?

A. Yes.

Q. Collette Mitre is your daughter, is that right?

A. That's right.

Q. She is the only living child that you have?

A. Yes.

Q. I show you a policy issued by General Insurance Company of America, No. 2737 F-7909, in the amount of

(Testimony of Laura Gawecki)

\$35,000, premium, \$468.60, and ask you if you have ever seen that policy before. A. Yes.

Q. Is that the policy that was issued to you?

A. It is.

Q. And did you pay the premium on that policy?

A. I did.

Mr. Penney: I offer this policy in evidence, your Honor, [3] as Plaintiffs' Exhibit No. 1.

Mr. Davis: That is the General policy—the policy of General Insurance Company of America?

The Clerk: Plaintiffs' Exhibit 1 is in evidence.

(The document referred to was marked Plaintiffs' Exhibit 1 and was received in evidence.)

Q. By Mr. Penney: I will show you a policy issued by the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, being policy No. 1362125, premium of \$150.61, the policy being issued in the amount of \$12,500, and I will ask you if you have ever seen that policy before. A. Yes.

Q. Did you pay the premium of \$150.61?

A. I did.

Q. Has any portion of that premium ever been returned to you? A. No.

Mr. Penney: I will offer this policy in evidence as Plaintiff's Exhibit No. 2.

Mr. McBain: No objection.

The Court: It may be received.

The Clerk: Plaintiffs Exhibit No. 2 in evidence.

Q. By Mr. Penney: Mrs. Gawecki, from whom did you purchase the property known as Skylark Cafe.

A. From Maurice Villon and Edward Matlin. [4]

(Testimony of Laura Gawrecki)

Q. And when did you make that purchase?

A. I believe it was about May 20, 1945.

Q. Was that purchase made through an escrow?

A. It was.

Q. Were there certain escrow instructions executed in regard to the purchase of that property?

A. There were.

Q. I will show you two instruments, one is marked Escrow Instructions, and the other Supplemental Escrow Agreement, and ask you if you recognize those instruments.

A. Yes.

Q. Are those the escrow instructions and supplemental amendment to the escrow instructions under which you purchased the business known as Skylark Cafe, in May 1945?

A. Yes.

Mr. Penney: I will offer these escrow instructions and supplemental escrow instructions in evidence.

Mr. Davis: To which we object as being incompetent, irrelevant and immaterial, unless they prove ownership.

Mr. Penney: They prove two things, Mr. Davis. The offer is made for this purpose: To show that the escrow instructions were subject to inspection by Mr. Pransky, and by the agent of General Insurance Company at the time of the purchase, and this referred to a chattel mortgage which was subsequently placed on record in this county. [5]

Mr. McBain: May it be understood that the Dubuque Fire & Marine Insurance Company joins in the objection Mr. Davis has stated?

Mr. Davis: We still object to this as being incompetent, irrelevant and immaterial. If it is for the purpose of showing knowledge of the defendants of the existence of the chattel mortgage, it would still be immaterial.

(Testimony of Laura Gawecki)

The Court: I think the only way I can pass on this is to allow them in, and determine their legal effect. This is a non-jury trial. I am not likely to be prejudiced by what I learn. I will allow them subject to the legal effect, when the facts are in.

Mr. Davis: I don't want to disturb the continuity. We make the objection, and we can make a motion to strike?

The Court: You may make a motion to strike, or ask me to disregard the matter.

Mr. McBain: Your Honor, in the interest of time, may we have a stipulation of counsel, and the approval of the court, that the objection stated by Mr. Davis may also be deemed on behalf of the defendant Dubuque Fire & Marine Insurance Company?

The Court: Yes, unless you sever yourself from him, the presumption will be you are joining in any objections made.

Mr. Penney: So stipulated.

The Court: They may be received as one exhibit. They are related to each other. [6]

The Clerk: Plaintiffs' Exhibit 3 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 3 and was received in evidence.)

Q. Mr. Penney: Do you know Mrs. O'Rourke?

A. I do.

Q. How long have you known her?

A. About 21 or 22 years.

Q. Did you ever disclose the contents of the escrow instructions to Miss O'Rourke? A. I did.

Mr. Davis: Same objection; incompetent, irrelevant and immaterial.

(Testimony of Laura Gawecki)

The Court: I will allow it subject to a motion to strike.

Q. By Mr. Penney: Do you know Mr. Pransky?

A. Yes, I do.

Q. Did you see him at any time at the bank, or at the place where the escrow was held? A. Yes.

Mr. McBain: May my objection be stated before the answer, as incompetent, irrelevant and immaterial?

The Court: All right. Overruled.

Q. By Mr. Penney: Where was this escrow?

A. At the L. E. Alimisis Realty Company, Sunset Boulevard. [7]

Q. Mrs. Gawecki, whose money was put into the escrow for the purchase of this property?

A. My money.

Mr. Davis: I object to that again. It is alleged and admitted that the two plaintiffs, Gawecki and Mitre, were partners operating this business. That is immaterial.

(Discussion.)

The Court: I will allow her to answer the question, but I don't think, in view of the statement of counsel, and in view of the fact that they admit it in paragraph 11, that it requires any testimony.

Q. By Mr. Penney: Mrs. Gawecki, this property is located at 7519 Sunset Boulevard, in Los Angeles, is that right? A. Yes.

Q. How long were you in possession of the property?

A. Well, from May to January 11th, when the fire occurred.

Q. January—

A. 1946.

(Testimony of Laura Gawecki)

Q. You suffered a fire at that time, did you?

A. I did.

Q. Did you subsequently make a sworn statement in proof of loss to both General Insurance Company, and the Dubuque Fire & Marine Insurance Company? [8]

A. I did.

Q. I show you an instrument, your sworn statement in proof of loss, just addressed to General Insurance Company, and ask you if that is your signature.

A. It is.

Mr. Penney: I offer the sworn statement of loss as Plaintiffs' Exhibit No. 4.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

The Clerk: Plaintiffs' Exhibit 4 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 4 and was received in evidence.)

Mr. Davis: That is the General?

The Clerk: That is right.

Q. By Mr. Penney: And a sworn statement in proof of the loss addressed to the Dubuque Fire & Marine Insurance Company, and ask you if that is your signature.

A. It is.

Q. This sworn statement was subsequently sent to the Dubuque Fire & Marine Insurance Company through their adjusting representative?

A. Yes.

Mr. Penney: I offer this as Plaintiff's Exhibit No. 5.

The Clerk: Plaintiffs' Exhibit 5 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 5 and was received in evidence.) [9]

(Testimony of Laura Gawecki)

Mr. Penney: You will stipulate, will you not, that Dauerty & Daurety were the adjusting representatives for both these defendant companies, in the adjustment of this loss?

Mr. Davis: Yes.

Mr. McBain: So stipulated.

Mr. Penney: Mr. Davis, I don't have the original request here by Dauerty & Dauerty for determinataion of appraisers in this matter.

Mr. Davis: I don't know, but I don't think there is any issue on it. May I make the statement that we will admit that within the time provided for in the policy that the plaintiffs, or plaintiff, singular, in the case of the General, presented proofs of loss in the form provided for in the policy; that within the 20 days, as provided for therein, defendants, and each of them, took exception to the amount of loss claimed by plaintiffs in their respective proofs of loss; that also, within the time provided for in the policy, the defendant demanded an appraisal of the amount of loss, according to the terms of the policy, and that an appraisal, under the terms of the policy, fixing a value on the amount of loss and damages, was duly had. I don't remember what the amount was. I would like to offer in evidence my reply to the demand for appraisal, and the reply of Dauerty & Dauerty to my letter.

Mr. McBain: May I ask Mr. Penney to accept the stipulation? [10]

Mr. Penney: Yes, I accept the stipulation.

Mr. McBain: The Dubuque Fire & Marine makes the same stipulation.

(Testimony of Laura Gawecki)

Mr. Penney: So accepted.

I will offer, your Honor, at this time, the reply of myself to the adjusting representatives of both the Du-buque & General Companies, and their communication to me in connection with the appraisal,—the two letters as plaintiffs' exhibits.

Mr. Davis: To which we object as being wholly incompetent, irrelevant and immaterial, and I will state as one of our reasons, that the policy provides specifically that this is a California standard policy, and that this company shall not be held to have waived any conditions of this policy. I will read it:

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage or by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for."

That is the California standard statutory provision, and that has been sustained both by the California courts, and the Ninth Circuit.

The Court: If you claim a waiver, I will have to [11] sustain the objection. I will sustain the objection on the ground that there is not any modification of the stipulation in the written agreement. On the contrary, the condition in the written agreement is that no waiver is intended. The objection will be sustained.

Mr. Penney: I offer in evidence at this time, in view of the stipulation, the agreement for submission to appraisers and the award of the appraisal agreement as plaintiffs' exhibit.

(Testimony of Laura Gawecki)

The Clerk: No. 6.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 6 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 6 and was received in evidence.)

Q. By Mr. Penney: Mrs. Gawecki, under the contract to purchase did you issue to Edward E. Matlin a chattel mortgage for the balance of the purchase price of the property? A. I did.

Mr. Penney: Counsel, you will stipulate that the chattel mortgage was recorded on or about the 22nd day of August, 1945?

Mr. Davis: Yes.

Mr. Penney: In the official records of the County of Los Angeles, State of California?

Mr. Davis: Yes. We have a certified copy of both of the mortgages here. [12]

The Court: You have admitted the execution in paragraph 11; you have admitted their existence, and the dates.

Q. By Mr. Penney: Following the fire did you pay off the chattel mortgage to Edward E. Matlin?

A. I did.

Q. I will show you a release of mortgage, and ask you if that is the instrument which he returned to you.

A. It is.

Mr. Penney: I will offer this as plaintiff's next in order.

Mr. Davis: I object to that as wholly immaterial. It is long after the fire, that the chattel mortgage was paid off by the plaintiff. Is that correct?

(Testimony of Laura Gawecki)

The Witness: Yes.

The Court: Objection overruled. It is to show the condition of the title.

The Clerk: Plaintiff's Exhibit 7 in evidence.

Q. By Mr. Penney: Mrs. Gawecki, I will show you a lease entered into between Walter J. McCormick and Isabelle McCormick, as landlords, and yourself and Collette Mitre, as tenants, and ask you if that lease was in escrow at the time that you purchased this property.

A. It was.

Q. Did you, in conformity with this lease, ever execute a separate chattel mortgage for security of the rent? [13]

A. I did.

Q. Was that chattel mortgage in escrow at the time that Mr. Pransky and Miss O'Rourke were there at the place of the escrow holders?

A. It was.

Mr. Davis: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled. I will allow this to be gone into, and will determine the legal effect later on.

Q. By Mr. Penney: Have you subsequently, after the fire, paid all the rent due and owing to the landlord?

A. I have.

Q. You have vacated the premises?

A. Yes.

Q. You have received nothing from either of these companies?

A. Nothing.

Mr. Penney: You may cross examine.

Mr. Davis: There will be no cross examination.

(Short recess.)

Mr. Penney: Your Honor, I don't want to be persistent in this matter, but for the purpose of the record, there is nothing which shows I have made an offer of proof in regard to these two letters.

The Court: I thought they were marked for identification. [14]

The Clerk: No.

The Court: They may be marked for identification.

Mr. Penney: Very well, and I will make the offer of proof, so they will become a part of the record.

The Clerk: Plaintiffs' Exhibit 8 for identification.

LORAIN O'ROURKE

a witness called by and on behalf of the plaintiffs, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Loraine O'Rourke.

Direct Examination.

By Mr. Penney:

Q. Is it Miss or Mrs. O'Rourke?

A. It has been Mrs., but I go under my maiden name. I always have.

Q. What is your occupation?

A. I haven't been active in business. I am not too active now. I have been dealing in real estate and insurance all my life.

Q. Were you dealing in insurance in the summer and spring of 1945? A. Yes, sir.

Q. Do you know Laura Gawrecki, one of the plaintiffs in this case? A. Yes. [15]

Q. How long have you known her?

A. Well, I think I have known her about 25 years; 24 years; somewheres along there.

(Testimony of Loraine O'Rourke)

Q. Were you familiar with the details of a transaction in which she purchased the Skylark Cafe?

A. Yes, sir.

Q. Did you ever see any escrow instructions in connection with the purchase of the Skylark Cafe?

A. Yes, sir.

Q. Do you know Mr. Meyer Pransky?

A. Yes, sir.

Q. Did you ever see him at the escrow holder's?

A. Not in the escrow department, no, I didn't.

Q. Did you ever discuss with Meyer Pransky the escrow, or the matters pertaining to the purchase of the Skylark Cafe?

A. Yes, sir.

Q. Were you ever appointed as an agent of the General Insurance Company of America, a defendant in this case?

A. Yes, sir.

Q. Do you recall the date that you were made agent of the General Insurance Company?

A. Let me think. It is kind of hard to remember back. About June or July.

Q. Perhaps this instrument will refresh your recollection.

A. Yes, that's right, June, 1945.

Q. The 26th of June, 1945 you were appointed as agent of the General Insurance Company of America, is that right?

A. Yes.

Mr. Penney: Counsel, will you stipulate that prior to the issuing of this policy that Meyer Pransky was the agent of the Dubuque Fire & Marine Insurance Company?

Mr. McBain: Yes, I will so stipulate.

(Testimony of Loraine O'Rourke)

Q. By Mr. Penney: Now, Miss O'Rourke, do you know the circumstances under which these policies, Exhibit No. 1, and Exhibit No. 2, Plaintiffs', were issued?

A. Yes, sir.

Mr. Davis: To which we object as being incompetent, irrelevant and immaterial, the action being on a written instrument, and all prior negotiations are merged in the written instrument.

The Court: I will overrule the objection, because of paragraph 11.

Mr. McBain: May I amend the objection, because it would call for the conclusion of this witness, and has no relationship to our company.

The Court: Overruled.

Q. By Mr. Penney: Do you know the circumstances under which the insurance was written?

A. Yes, sir, I understand the circumstances. Shall [17] I go from the beginning?

The Court: In a general way. I presume you knew of the sale?

Mr. Penney: Perhaps I can lead you along for the purpose of shortening time. Were there other insurance policies in existence at the time of the transfer of the property to the plaintiffs in this case?

A. Yes, there were.

Q. What, if anything, happened to those insurance policies?

A. I looked them all over, and had some of them cancelled, because there was too much insurance on the property. This Dubuque, and one similar to this, which they rewrote, I wanted to keep, because it was a good policy, and this one with the General. But there were

(Testimony of Loraine O'Rourke)

quite a few which it was not necessary to have, so we cancelled them.

Q. Did you know of the existence, at the time of the issuing of this policy, that there was a chattel mortgage in favor of the owners of the property for the unpaid purchase price? A. Yes, sir.

Mr. Davis: We object to this as incompetent, irrelevant and immaterial, and not within any of the issues of the case.

The Court: Overruled.

Mr. McBain: So far as the Dubuque Fire & Ma- [18] rine Insurance Company is concerned, it would be hearsay, and incompetent, irrelevant and immaterial, since the witness is not related to that company.

Mr. Davis: I would like to make the further statement that there is no showing that this person was the person who executed this contract on this policy. The contract was executed by the agent Thomas V. Humphreys. She would not be acting within the course of her employment.

The Court: Overruled.

Mr. Penney: You may answer, if you knew of the existence of the chattel mortgage executed by the plaintiff in this case to the prior owners.

A. Yes, I was very well aware of it.

Q. Did you know of the existence of the lease that was executed by the plaintiff in this case to the owners of the property? A. Yes.

Q. Were you familiar with the terms and conditions of it?

A. No, I was not, on the lease; I was not familiar at all.

(Testimony of Loraine O'Rourke)

Q. Did you have a discussion with Meyer Pransky with regard to issuing the Dubuque policy? A. Yes.

Q. Where did that conversation take place? [19]

A. In my home.

Q. Who else was present besides yourself and Meyer Pransky?

A. One of his men, working in his office. I can't remember the name of the gentleman.

Q. Can you tell me about the conversation?

A. Before dinner time—I don't know the date; I don't remember that far back; I know it was at the time Mrs. Gawecki was buying the Skylark, we had these policies. He came over to see me, because there were several which had not been paid for.

Q. What conversation did you have with him regarding the issuing of that policy?

Mr. McBain: The Dubuque Fire & Marine objects as incompetent, irrelevant and immaterial, and no showing of authorization on the part of Pransky.

The Court: I will sustain the objection. I will admit the conversation between this witness and Mr. Pransky.

Mr. Penney: I was trying to limit it with Pransky.

Mr. Davis: She said she did not talk with Pransky.

A. No, he was there, and one of his men; both were there. The other gentleman, I don't remember his name.

The Court: Pransky was present?

A. Yes.

The Court: I will overrule the objection. [20]

Q. By Mr. Penney: You may relate the conversation you had with regard to issuing the policy.

(Testimony of Loraine O'Rourke)

Mr. Davis: I would make the same objection, as incompetent, irrelevant and immaterial; no authority shown to make the statements, and the extent of authority, if any, not shown; and further, it is an attempt to vary and change the terms of a written instrument by previous conversations, which are merged in the instrument.

The Court: Overruled.

Q. By Mr. Penney: Relate what you said, and what Mr. Pransky said.

A. Mr. Pransky and I discussed other insurance, and this particularly, the Dubuque, keeping this one. There was another policy cancelled, which has no bearing on this case at all. It was a general conversation.

Q. Do you know whether these other policies were in escrow,—the ones that were cancelled?

A. Yes, they were.

Q. Were those the ones you discussed with Mr. Pransky?

A. Yes. I had them in my possession. Then I sent them back to him through the mail.

Mr. Penney: I will offer this Notice of Appointment in evidence, as Plaintiffs' Exhibit 9.

The Court: It may be received.

The Clerk: Plaintiffs' 9 in evidence. [21]

(The document referred to was marked Plaintiffs' Exhibit 9 and was received in evidence.)

Mr. Penney: Cross examine.

Cross Examination

By Mr. Davis:

Q. You spoke of other policies that were in escrow. Those were policies that were not insuring Mrs. Gawecki or Mrs. Mitre? A. Yes.

(Testimony of Loraine O'Rourke)

Q. They were insuring somebody else?

A. I think one of them was issued in her name, but the others were in the first owner's name, to be transferred in her name.

Q. Had they been transferred to her? Was there an insurance covering Mrs. Gawecki in escrow?

A. I can't remember exactly, because there were so many of them.

Q. Were there any policies you had handled as an agent of anybody, in escrow?

A. No, these were all policies—I remember them. There was one, a compensation policy, issued to her, which she kept. It does not have any bearing.

Q. Don't you decide what has bearing. I would like to get a straight story. When did you first enter into these negotiations, become a party to the negotiations, by which Mrs. [22] Gawecki and Mrs. Mitre bought this business?

A. During the time she was buying the Skylark.

Q. When was that? A. Sometime in May.

Q. May what? A. 1945.

Q. What part did you have to do with the negotiations for the purchase? Did you negotiate with the previous owners? A. No, I did not.

Q. She had already made her deal with them?

A. That's right.

Q. She consulted you about insurance only?

A. That's right.

Q. You then went to where the escrow was?

A. No, Mrs. Gawecki got the policies, and handed them to me.

Q. She got the policies the previous owner had?

A. She got them out of escrow.

(Testimony of Loraine O'Rourke)

Q. And brought them to you?

A. Yes, or I got them at her place of business.

Q. You decided to cancel all previous owners' policies except the Dubuque?

A. No, there were a couple of others.

Q. All I want to know is, you did write some insurance for Mrs. Gawecki? [23]

A. Yes, I did.

Q. What was the company?

A. The General Insurance Company.

Q. Compensation in the General?

A. No, just this particular fire.

Q. At the time you made negotiations you had not been appointed agent for the General then, had you?

A. I don't recall.

Q. Let me refresh your memory. You made the application for the insurance that later eventuated in the General policy through the Republic Insurance Company, is that correct? A. That is correct.

Q. You had no negotiations with the General at that time? A. No.

Q. You never talked with anybody from the General?

A. No.

Q. You put your application in the Republic?

A. That is correct.

Q. They informed you they had the risk bound?

A. They did not say anything.

Q. Just said it was bound? A. Yes.

Q. That was along about the 21st of June, was it not?

A. I don't remember. It was written in May, with other [24] insurance. In May we talked about it or discussed it.

(Testimony of Loraine O'Rourke)

Q. Let us assume that the policy was sometime in June. It was written in May, and you called the Republic Insurance Company?

A. I did not call them. I went into their office. It was sometime in June, I think.

Q. Who did you talk with at Republic?

A. Mr. Sharp.

Q. At that time he did not tell you what company he was going to place the insurance in, did he?

A. No, he did not.

Q. Then later you received, through Mr. Sharp the General policy? A. That is correct.

Q. You did not have any idea he was going to get a General policy? A. That is correct.

Q. As a matter of fact, you told me if you had known it was going to be General you would not have taken it?

A. That is correct.

Q. All of your relations with General were through Mr. Sharp of the Republic? A. Yes.

Q. It was after the insurance had been written that Mr. Sharp requested General to procure an agent's license for you? [25]

A. I don't know anything about that.

Q. You never requested General to procure an agent's license? A. No, not directly.

Q. The Republic requested General to give you an agent's license so they could pay you a commission on this policy?

A. That is hearsay. I don't know anything about it.

Q. You have never had any relationship with General?

A. Not direct. I used to, years ago.

(Testimony of Loraine O'Rourke)

Q. The only relationship you had with General, except years ago, was the receiving of this appointment of agent that you received after the 28th of June.

A. Yes.

Q. In order to enable you to get a commission on this policy?

A. I received from Sacramento a notice.

Q. You received a notice from Sacramento?

A. That is correct.

Q. The sole purpose of the agency appointment was to enable you to get a commission on the policy that had already been written through Mr. Humphreys' office, is that correct?

A. I don't know. I guess that was the general way they do business.

The Court: You know the Insurance Commissioner [26] would not allow you to receive a commission unless you were licensed as an agent, any more than you could get a commission for selling real estate unless you were licensed as a broker or salesman?

A. That's right.

Q. By Mr. Davis: All the negotiations with reference to the General policy had been concluded before you got your agent's commission?

Mr. Penney: Do you mean before she received it?

Mr. Davis: Before you received it. It doesn't take effect until it is filed in the Commissioner's office.

A. That's right.

Q. I am going to call your attention to what we call a cover note, or a binder, and note that that bound the insurance from the 21st day of June.

A. I have never seen this before.

(Testimony of Loraine O'Rourke)

Q. Were you ever advised of this by Mr. Sharp?

A. What is it?

Q. That is temporary insurance from June 21 to July 21, until the policy could be written.

A. I don't know anything about this. I have never seen this before.

Q. You were merely advised by Mr. Sharp that he had procured coverage for Mrs. Gawrecki?

Mr. Penney: I am going to object as being outside of the [27] issues in this case. That is something that occurred prior, and is merged in this insurance.

The Court: I think counsel is trying to show that the negotiations were not directly with the company, and there was a binder. I understand that is always the result, if it takes time to write the policy. She did not know of its existence, except she was told the insurance would be effective from that date?

The Witness: That is correct.

Q. By Mr. Davis: Later you received the policy through the mail?

A. I went in and picked it up.

Q. You went into Mr. Sharp's office and picked it up?

A. Yes.

Q. Prior to this loss had you ever had negotiations or discussions with Mr. Humphrey's the agent for the General Insurance Company?

A. No.

Q. You did, a long time after the loss occurred, go into Mr. Humphreys' office and ask why the policy had not been paid?

A. That's right.

Mr. Davis: That is all.

Mr. McBain: I have no questions, your Honor.

The Court: Any redirect?

Mr. Penney: No redirect. Your Honor, I shall offer in [28] evidence, with Exhibit No. 6, the breakdown of the award of the appraisers.

Mr. Davis: That is exactly the same amount?

Mr. Penney: Yes. That is the breakdown, showing how we arrived at the amount we sued on.

Mr. Davis: We have no objection.

Mr. McBain: We have no objection.

The Clerk: Shall it be stapled to this Exhibit 6, your Honor?

The Court: Yes.

Mr. Penney: We rest.

Mr. Davis: The General Insurance Company wishes to offer in evidence—

Mr. McBain: Make it on behalf of both companies.

Mr. Davis: You join with me in this offer?

Mr. McBain: Yes.

Mr. Davis: I offer the two chattel mortgages here referred to.

The Court: Haven't they been received?

Mr. Davis: Not the chattel mortgages. They have been admitted, but to clarify the record—

The Court: Let us take the real chattel mortgage for the balance of the purchase price. One is merely security for the rental.

Mr. Davis: They are both real chattel mortgages. [29] The one on the purchase price, we will take that first.

The Court: A

The Clerk: Defendants' Exhibit A in evidence.

(The document referred to was marked Defendants' Exhibit A and was received in evidence.)

Mr. Davis: That chattel mortgage was executed the 7th of July, 1945, and was recorded the 22nd of August; and the one I am handing the clerk now is also executed on the 7th of July, and recorded the 22nd of August.

One of these mortgages one-third interest in the property and the other a two-thirds' interest, both to secure—

Mr. Penney: They are only security for one note?

Mr. Davis: That's right. We will offer the other chattel mortgage, which is a chattel mortgage signed by Laura Gaweckie and Collette Mitre, given to secure a promissory note for \$13,500.00, mortgaging a one-third interest. The first is given to secure a promissory note for \$13,500.00, mortgaging a two-thirds' interest.

Mr. Penney: I will stipulate to the execution of the chattel mortgages, but they are given only to secure the payment of one note.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

The Clerk: Do you wish them both marked separately?

Mr. Davis: It may be better. [30]

The Clerk: The second one is Defendants' Exhibit B.

Mr. Davis: One mortgages a one-third interest, and the other a two-thirds' interest.

Mr. Penney: For the payment of the same note.

Mr. Davis: Will you stipulate that these mortgages mortgage property described in the policy, and in the proof of loss?

Mr. Penney: No question about it.

Mr. Davis: They mortgage all the property?

Mr. Penney: That's right, one, one-third, and the other, two-thirds, for the payment of one note of \$13,500.00.

The Court: All right.

Mr. Davis: The defendant General rests, your Honor.

The Court: Have you any rebuttal?

Mr. Penney: No rebuttal, your Honor.

The Clerk: Did both defendants rest?

Mr. McBain: Yes, your Honor, the defendant Du-
buque Fire & Marine Insurance Company will rest. [31]
Los Angeles, California, Wednesday, July 30, 1947.

Mr. Penney: This is a motion I made in the form
of a letter to the clerk.

The Court: I think there was a misunderstanding.
It was not my desire to put this on for hearing the testi-
mony at the present time, but merely to discuss whether
such permission should be granted, because the letter
did not disclose the nature of the testimony,—whether
it would alter the factual situation. Who is appearing on
the other side?

Mr. Penney: Mr. Davis and Mr. McBain.

The Court: Unless you gentlemen will stipulate to it.

Mr. Davis: I suggest that he put it in writing, and
give it to us.

The Court: What is it you want to show, notice of
intention to mortgage was given?

Mr. Penney: Yes.

The Court: I don't think the legal effect of that
would change it, because that notice is merely for the
protection of creditors. I don't think it would affect
the existence or non-existence. Why don't you stipulate?

Mr. Davis: We told him we would probably stipulate.

The Court: I am ready to decide the case, gentle-
men, but I will be very glad to have you state in the form

of a letter, or any addition to your memoranda, why you think that that [32] might change the situation.

Mr. Penney: I can make a very brief statement at this time.

The Court: You make your statement. I will have it put into the record, and see if Mr. Davis will stipulate. Then I will give you additional time if you desire, by way of letter. I don't want any additional information. You know this case was argued very fully. I will make this order: I will reopen the case solely for the purpose of allowing counsel to make a statement concerning any fact which may be stipulated to, but was not testified to by anybody at the time of the trial. You may proceed.

Mr. Penney: Your Honor, subject to the objection of the defendants in this case, I desire to offer in evidence at this time the publication of notice of intended mortgage under Section 3440 of the Civil Code, which was published in the Independent-Review June 15, 1945, together with a certified copy of the Notice of Intended Mortgage, which was recorded in the office of the County Recorder of this county on the 15th day of June, 1945, showing an intended mortgage on the part of these plaintiffs to Walter J. McCormick and Edward A. Matlin.

The Court: Who signed the notice?

Mr. Penney: The notice was signed by Laura Gawecki and Collette Mitre. [33]

The Court: That was mother and daughter?

Mr. Penney: That's right, the plaintiffs in this action.

Mr. Davis: We will admit it subject to our objection that it is incompetent, irrelevant and immaterial.

The Court: I will overrule the objection. But you do not raise any question as to its existence?

Mr. Davis: No.

The Court: To the effect that such notice was given, and publication, as required by Section 3440 of the Civil Code?

Mr. Davis: It is a matter of public record. We have a certified copy.

Mr. McBain: Subject to the same objection, so stipulated.

The Clerk: The plaintiffs' last exhibit was No. 9.

Mr. Penney: The publicaation will be 10.

The Court: The publication will be marked 10.

Mr. Penney: And the Notice of Intended Mortgage.

The Court: No. 11.

Mr. Penney: Your Honor, I have had the testimony of the plaintiff written up, and we have agreed that I may make a statement here regarding what her further testimony would be, subject to their objections that it is incompetent, irrelevant and immaterial.

The plaintiff, if called, would testify that she is now [34] 62 years of age; that her husband passed away some four or five years prior to the time of this transaction; that she had had no previous business experience of any kind, nor had she ever had any insurance policies written on any of her property; that she gave no information concerning the nature of her ownership, other than that contained in the escrow instructions at the time; that she did not read the policies after she received them, and at no time was her rent in arrears under the mortgage.

Mr. Davis: All we can do, subject to our objection as to incompetency and immateriality, is to agree on counsel's statement that she would so testify.

Mr. McBain: The remaining defendant would join in that, save for the statement as to the escrow instructions. We do not want to give rise to an inference that she handed the escrow instructions to any representative of the defendant insurance companies.

Mr. Davis: I don't take it that you mean it that way.

Mr. Penney: No.

Mr. Davis: In other words, she gave notice.

Mr. Penney: That she gave them no information concerning the nature of her ownership, except what information was contained in the escrow instructions.

Mr. Davis: Do you mean by that she gave them the escrow instructions? [35]

The Court: She was charged with knowledge of the escrow instructions, no matter how inexperienced she was.

Mr. Davis: I think we ought to clarify an ambiguous statement of Mr. Penney's. Do I understand what you want to say is that Mrs. Gawecki made no affirmative representations to us?

The Court: Made no representation; not affirmative. No representation as to her ownership, one way or another, and she was not asked anything about the ownership, isn't that right?

Mr. Penney: No, your Honor, we have positive testimony of Mrs. O'Rourke that she knew about this. I can put the plaintiff on the stand at some time convenient to the court, and ask her. Of course, I was merely trying to save time today, by giving a brief analysis of what she would testify to.

The Court: Can you agree to that?

Mr. Davis: I think so, if he clears up the ambiguity.

The Court: Restate it then.

Mr. Penney: She would testify that she is a widow, 62 years of age; that she had had no previous business

experience prior to this time; that she had had no experience at all in the supervision of the writing of any insurance policies; that at the time these policies were written that she made no representation to either of the two agents concerning her absolute ownership of the property, further than that [36] a chattel mortgage was given for the payment of the rent; that no rent was ever due under that mortgage.

Mr. Davis: It was never in arrears?

Mr. Penney: It was never in arrears under that mortgage. That when she received the policies she did not read the policies.

The Court: All right.

Mr. Davis: Yes, we will admit she would so testify.

Mr. McBain: So stipulated subject to our objection as to materiality.

Mr. Penney: There is one other thing. Mr. McBain and I have discussed the matter, and that is the agency that Pransky had at that time. We have not been able to determine that. We will advise the court by letter what that agency was, as soon as we obtain it.

Mr. McBain: That is correct. I will join with counsel in the letter subject, however, to its materiality.

The Court: How much time do you want?

Mr. Penney: I would say a week.

Mr. McBain: When Mr. Pransky returns, I think by Tuesday of next week, we can have that letter for your Honor.

The Court: Now, do you desire to make any comment in writing about the effect of this additional testimony which has been offered in regard to the notice?

Mr. Penney: I don't think it is necessary, unless the [37] court wishes it.

The Court: I leave it to you gentlemen.

Mr. McBain: I don't think it adds anything.

The Court: Then you desire a week in which to supply some fact in regard to the nature of the agency?

Mr. McBain: That is Mr. Penney's request. As soon as I am able to obtain the exact nature, I will join in a letter with him, and advise the court.

The Court: Counsel will be given until Wednesday the 6th of August, in which to supply, in the form of a letter, additional information in regard to the nature of the agency, the matter to stand submitted after the receipt of the letter.

Mr. Davis: That applies only to the defendant Dubuque.

The Court: The cases were tried together.

Mr. Davis: I am not interested in this information.

[Endorsed]: Filed Oct. 7, 1947, Edmund L. Smith, Clerk. [38]

[Endorsed]: No. 11775. United States Circuit Court of Appeals for the Ninth Circuit. Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, Appellants, vs. General Insurance Company of America, a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed November 3, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11775

LAURA GAWECKI and COLLETTE MITRE, dba
SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

GENERAL INSURANCE COMPANY OF
AMERICA,

Appellee.

No. 11776

LAURA GAWECKI and COLLETTE MITRE, dba
SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-
PANY OF DUBUQUE, IOWA,

Appellee.

Upon Appeals From the District Court of the United
States, for the Southern District of California,
Central Division

APPLICATION FOR ORIGINAL EXHIBITS TO
BE CONSIDERED IN ORIGINAL FORM
WITHOUT PRINTING

Come now the appellants by their attorneys George
Penney and Robert M. Newell and make formal applica-
tion that the original exhibits in the above-entitled causes
may be considered in their original form without printing.

Respectfully submitted,

GEORGE PENNEY and
ROBERT M. NEWELL

By George Penney

Attorneys for Appellants

So Ordered:

FRANCIS A. GARRECHT

Senior United States Circuit Judge

[Endorsed]: Filed Nov. 13, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Causes]

No. 11775 No. 11776

STATEMENT OF POINTS ON APPEAL

Come now the appellants, by their attorneys, and in lieu of filing a statement of points upon which they intend to appeal, adopt the statement of points filed with the Clerk of the trial court in the District Court of the United States, Southern District of California, Central Division.

Dated: October 27, 1947.

GEORGE PENNEY and
ROBERT M. NEWELL

By George Penney

Attorneys for Appellants

Received copy of the within Statement of Points on Appeal October, 1947. Hindman & Davis, by E. Eugene Davis, Attorneys for Appellee General Insurance Co.; Angus C. McBain, Attorney for Appellee Dubuque Fire & Marine Ins. Co.

[Endorsed]: Filed Nov. 13, 1947. Paul P. O'Brien,
Clerk.

No. 11776

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,

Appellants,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-
PANY OF DUBUQUE, IOWA, a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

No. 11776

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,

Appellants,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-
PANY OF DUBUQUE, IOWA, a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Answer	7
Appeal:	
Notice of	34
Statement of Points on.....	38
Statement of Points on Appeal (Circuit Court).....	44
Stipulation and Order re Exhibits.....	40
Stipulation for Costs on.....	35
Application for Original Exhibits to Be Considered in Original Form Without Printing (Circuit Court)....	43
Certificate of Clerk.....	41
Complaint for Damages Under Fire Insurance Con- tract	2
Findings of Fact and Conclusions of Law.....	19
Judgment	29
Letter, Dated August 4, 1947, to Trial Judge.....	14
Memorandum Decision (By Reference).....	16
Minute Order Entered August 29, 1947 (By Refer- ence)	34
Motion for a New Trial, to Amend Findings of Fact and Conclusions of Law and Direct Entry of a New Judgment	32
Names and Addresses of Attorneys.....	1

	Page
Notice of Appeal.....	34
Notice of Entry of Judgment.....	31
Objections to Proposed Findings of Fact and Conclusions of Law.....	16
Reporter's Transcript of Proceedings (By Reference)	42
Statement of Points on Appeal (Circuit Court).....	44
Statement of Points on Appeal (District Court).....	38
Stipulation and Order re Exhibits.....	40
Stipulation for Costs on Appeal.....	35

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

GEORGE PENNEY

ROBERT M. NEWELL

939 Rowan Building
458 South Spring Street
Los Angeles 13, Calif.

For Appellee:

ANGUS C. McBAIN

639 South Spring Street
Los Angeles 14, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 5869-Y

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,

Plaintiffs,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-
PANY OF DUBUQUE, IOWA, a corporation,

Defendant.

COMPLAINT FOR DAMAGES UNDER FIRE
INSURANCE CONTRACT

Plaintiffs Complain and Allege:

I.

That at all times herein mentioned plaintiffs were partners doing business under the fictitious name of Skylark Cafe & Restaurant. That the plaintiffs were and are citizens of the State of California.

II.

That at all times herein mentioned defendant was and now is a corporation organized under and by virtue of the laws of the State of Iowa, and was and now is a citizen of the State of Iowa.

III.

That the defendant was at all times herein mentioned engaged in the business of writing insurance under and

by virtue of the [2] laws of the State of California pertaining to insurance companies.

IV.

That the amount in controversy herein, exclusive of interest and costs, is the sum of \$10,166.10 and is in excess of \$3000.

V.

That the jurisdiction of this court is based upon the diversity of citizenship of the parties hereto and the amount in controversy, exclusive of interests and costs, being in excess of \$3000.

VI.

That on or about the 9th day of July 1945, for a valuable consideration, defendant issued a fire insurance policy on the California standard form in which it insured the store, office, workshop, business, furniture, fixtures and equipment, tenants' improvements and betterments, and other personal property of the plaintiffs located at 7519 Sunset Boulevard, Los Angeles, California, in the amount of \$12,500.

VII.

That on or about the 12th day of January 1946, and while said insurance policy hereinabove mentioned was in full force and effect, a fire occurred on the premises occupied by the plaintiffs resulting in loss and damage to the property of the plaintiffs in the amount of \$26,880.23.

VIII.

That immediately thereafter plaintiffs gave written notice of said loss to defendant, and protected the property

from further damage, separated the damaged and undamaged personal property, and put it in the best possible order, and made a complete inventory, stating the quantity and cost of each article and the amount claimed thereon. That within 60 days after the commencement of the fire, the insured notified the defendant company, at its main office in California, by written statement, signed and sworn to, setting forth [3] their knowledge and belief as to the origin of the fire, the interest of the insured and all others in the property, the cash value of the different articles or properties and the amount of loss thereon, all encumbrances thereon, all other insurance covering said articles, a copy of the description and schedules of all other policies, and all changes of title, use, occupancy, location, and possession of said property.

IX.

That following the receipt by defendant of the said sworn proof of loss hereinabove mentioned, defendant disagreed with the amount claimed therein and demanded of plaintiffs that they submit the question of the amount of loss and damage to an appraisal, and defendant named a competent and disinterested appraiser; whereupon and pursuant to said request for appraisal these plaintiffs named a competent and disinterested appraiser, and the two appraisers so selected nominated an umpire; and thereafter the two appraisers and the umpire did, on or about the 21st day of May 1946, agree in writing that the loss and damage to the property of the plaintiffs was the sum of \$26,880.23.

X.

That there was in existence at the time of the issuing of said policy of defendant a policy of insurance issued

by the General Insurance Company of America in the amount of \$35,500, making a total insurance on the property of the plaintiffs in the amount of \$48,000. That the insurance policy of the General Insurance Company of America insured separately the food and liquor of plaintiffs, the loss to which under the appraisal agreement above mentioned was determined to be the sum of \$1953.70. That the policy of insurance issued by defendant insured separately the tenants' improvements, the loss to which under the appraisal agreement above mentioned was determined to be the sum of \$4968.76. That the pro rata share of the balance of \$19,957.77 under the terms and conditions of the [4] policy issued by the defendant was $12.5/48 \times \$19,957.77$, or \$5197.34, making the total liability of defendant under its policy of insurance the sum of \$10,166.10.

XI.

That at the time of the issuing of said policy the plaintiffs were not the sole and unconditional owners of the personal property located at 7519 Sunset Boulevard, but there was at the time of the issuing of said policy in full force and effect a chattel mortgage on said property issued by plaintiffs to Walter J. McCormick and Edward A. Matlin, which fact was known to the agents of the defendant at the time of the issuing of said policy. That said property insured by defendant at 7519 Sunset Boulevard was further subject to a lien in favor of Leo Kanner and Bertha Kanner, owners of the building at 7519 Sunset Boulevard, for the payment of rents due said owners from plaintiffs, a fact which was known to the agents of defendant at the time of the writing of said contract of insurance.

XII.

That said mortgage issued to the said Walter J. McCormick and Edward A. Matlin, and said lien in favor of Leo Kanner and Bertha Kanner have heretofore been satisfied, and the plaintiffs are now entitled to all amounts due under said policy.

XIII.

That there is now due and owing from the defendant to the plaintiffs the sum of \$10,166.10, and although demand has been made upon the defendant for said sum, no part thereof has been paid.

XIV.

That plaintiffs are informed and believe and upon such information and belief allege that the defendant has refused payment of the amount due and owing to the plaintiffs under the policy of insurance because of a provision in said policy, viz.:

“This entire policy shall be void if the interest of the insured be other than unconditional and sole ownership.” [5]

XV.

That the defendant, with full knowledge of the fact that the interest of the plaintiffs was not that of sole and unconditional ownership, after the fire required plaintiffs to submit to an examination under oath, required plaintiffs to submit their loss to an appraisal, and has not at any time cancelled said policy or the remainder thereof and has retained the entire premium for said policy and has waived that portion of the terms and conditions of said policy which require the interest of the insured to be unconditional and sole ownership.

Wherefore, plaintiffs pray judgment against defendant in the sum of \$10,166.10, together with interest thereon at the rate of 7 per cent per annum from the 21st day of May 1946; for costs herein expended; and for such other and further relief as to the court may seem proper.

GEORGE PENNEY

Attorney for Plaintiffs [6]

[Verified.]

[Endorsed]: Filed Oct. 17, 1946. Edmund L. Smith, Clerk. [7]

[Title of District Court and Cause]

ANSWER

Comes now the defendant, Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, and for answer to the complaint herein:

I.

As to Paragraph I, alleges it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies the same and each and every allegation, matter, and thing therein contained.

II.

As to Paragraph IV, alleges it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies that the amount in controversy herein, with or without interest or costs, is in the sum of \$10,166.10, or in any sum, or in excess of \$3,000.00, or in any sum. [8]

III.

As to Paragraph V, alleges it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies that the amount in controversy, with or without interest and costs, is in excess of \$3,000.00, or in any sum.

IV.

As to Paragraph VI, admits that on or about the ninth day of July, 1945, for a premium paid, this defendant issued a fire insurance policy to plaintiffs on the California standard form in which it insured certain store, office, workshop, business, furniture, fixtures and equipment, and tenants' improvements, and certain other personal property at the location described in said Paragraph VI in an amount not to exceed \$12,500.00, which said insurance policy was subject to various terms, conditions, and limitations, contained therein and indorsed thereon, but denies each and every allegation, matter, and thing contained in said Paragraph VI, inconsistent with or contrary to that which is in this paragraph specifically admitted.

V.

As to Paragraph VII, denies that said insurance policy was in full force or effect, or that it was in force or effect at the time of the occurrence of said alleged fire, and as to the balance of said Paragraph VII, alleges it has no information or belief on the subject sufficient to enable it to answer and upon that ground denies the same and each and every allegation, matter and thing therein contained, and denies the loss and damage in the amount of \$26,880.23, or in any sum.

VI.

As to Paragraph VIII, admits that plaintiffs gave written notice of an alleged loss to defendant immediately after January 12, 1946; admits that within 60 days after January 12, 1946, the plaintiffs notified the defendant at its main office in [9] California by written statement, signed and sworn to, purporting to set forth their alleged knowledge and belief as specified in said Paragraph VIII. As to the balance of said Paragraph VIII, defendant alleges it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies the same and each and every allegation, matter and thing therein contained.

VII.

As to Paragraph IX, defendant alleges that it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies that the loss and damage agreed upon by said appraisers and umpire was upon the property described in this defendant's policy of insurance, or on any of said property, or that the loss or damage to the property described in said policy was in the sum of \$26,880.23, or in any sum.

VIII.

As to Paragraph X, admits that at the time of the issuance of defendant's policy there was in existence a policy of insurance issued by said General Insurance Company of America in the amount of \$35,500.00; admits said insurance policy of said General Insurance Company of America insured separately food and liquor; admits that by the terms of defendant's policy insurance was provided for tenants' improvements. As to the balance of said Paragraph X, not herein above specifically ad-

mitted, defendant alleges that it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies the same and each and every allegation, matter and thing therein contained, and denies the loss to food and liquor was determined to be the sum of \$1,953.70, or any sum, or that the loss to tenants' improvements was determined to be the sum of \$4,968.76, or any sum, or that the balance was \$19,957.77, or any sum, or that the pro rata share of the defendant in said or any balance [10] was in the sum of \$5,197.34, or in any sum. Denies that the total liability of this defendant was or is in the sum of \$10,166.10, or in any sum.

IX.

As to Paragraph XI, defendant denies that the existence of said chattel mortgage issued by plaintiffs to Walter J. McCormick and Edward A. Matlin, or the existence of said lien in favor of Leo Kanner and Bertha Kanner, was known to it or to any agents of this defendant at the time of the issuing or the writing of this defendant's policy, or at any time until said facts were first discovered after the occurrence of the alleged fire and loss and damage described in the complaint.

X.

As to Paragraph XII, defendant alleges it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies the same and each and every allegation, matter, and thing therein contained.

XI.

As to Paragraph XIII, defendant admits that demand has been made upon it for said sum, and admits that no part of said sum has been paid, but denies that there is now, or that there ever was, due or owing from this

defendant to plaintiffs the sum of \$10,166.10, or any sum.

XII.

As to Paragraph XIV, admits this defendant has refused payment of the amount claimed by plaintiffs under defendant's policy of insurance, amongst other reasons because of the policy provision quoted, but denies that said provision was or is the sole ground for defendant's refusal to pay said claim, and denies each and every allegation, matter, and thing in said Paragraph XIV inconsistent or contrary to the specific admissions or denials above made. [11]

XIII.

As to Paragraph XV, defendant admits it required plaintiff Laura Gawecki to submit to an examination under oath after the alleged fire, and admits that it requested that the loss be submitted to appraisal in accordance with the terms and provisions of its policy, and admits it has not at any time cancelled said policy or any portion thereof, and admits it has retained the entire premium for said policy, but denies the balance of said Paragraph XV and each and every allegation, matter, and thing therein contained.

As a First, Separate and Affirmative Defense to the Complaint Herein, the Defendant Alleges:

I.

That by the terms, provisions, and conditions of the defendant's policy of insurance sued on herein, it was provided, amongst other things:

“ . . . this entire policy would be void . . .
(b) if the interest of the insured be other than unconditional and sole ownership . . . ”

II.

That at the time of the occurrence of the alleged fire and loss and damage described in the complaint, the interest of the plaintiffs in the subject matter of the defendant's insurance policy was other than unconditional and sole ownership in that prior to the occurrence of the fire alleged in the complaint the plaintiffs herein did execute and deliver to and in favor of Walter J. McCormick and Edward A. Matlin a written chattel mortgage upon the property which was the subject of defendant's policy, and did execute and deliver to and in favor of Leo Kanner and Bertha Kanner an agreement in writing imposing a lien or a written chattel mortgage upon said property, and that said chattel mortgage in favor of said Walter J. McCormick and Edward A. Matlin, [12] and said lien or chattel mortgage in favor of said Leo Kanner and Bertha Kanner were, at all times after their execution and delivery, and at the time of and until some time after the occurrence of the alleged fire and loss and damage described in plaintiffs complaint, in full force and effect, and the holders of said chattel mortgages and lien at all of said times had an interest in said property.

As a Second, Separate and Affirmative Defense to Plaintiffs' Complaint, Defendant Alleges:

I.

That by the terms and provisions of the defendant's policy of insurance sued upon herein, it was provided amongst other things:

"Unless otherwise provided by agreement in writing indorsed hereon or added hereto, this company shall not be liable for loss or damage to any property insured here-under while incumbered by a chattel mortgage"

II.

That at the time of the occurrence of the alleged fire and loss and damage described in the complaint, the property described and insured by defendant's policy of insurance was incumbered by chattel mortgages in that prior to the occurrence of the fire alleged in the complaint the plaintiffs herein did execute and deliver to, and in favor of, Walter J. McCormick and Edward A. Matlin a written chattel mortgage upon said property, and did execute and delivery to and in favor of Leo Kanner and Bertha Kanner a written chattel mortgage and lien upon said property, which said chattel mortgages and lien were, at all times after their execution and delivery aforesaid, and at the time of and until some time after the occurrence of the fire and loss and damage described in plaintiffs' complaint, in full force and effect. [13]

III.

That there was never any provision by agreement in writing indorsed on the policy or added thereto, or otherwise, for said or any chattel mortgages, and this defendant had no knowledge or notice thereof until long after the occurrence of said alleged fire and loss and damage, if any.

Wherefore, defendant prays that plaintiffs take nothing by their action and that defendant go hence with its costs and with such other relief as appears meet and proper.

ANGUS C. McBAIN

Attorney for Said Defendant [14]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 22, 1946. Edmund L. Smith, Clerk. [15]

[LETTER DATED AUGUST 4, 1947, TO
TRIAL JUDGE]

Law Office

Angus C. McBain

McBAIN & MORGAN

Kermit J. Morgan

639 South Spring Street

—

Los Angeles 14, California

Leander W. Pitman

VAndike 1303

August 4, 1947

Hon. Leon R. Yankwich

Judge of the United States District Court

Federal Building

Los Angeles 12, California

Re: Gawecky vs. Dubuque—5869-Y Civil

Dear Judge Yankwich:

At the conclusion of the hearing on Mr. Penney's motion before you on the 2:00 o'clock calendar Wednesday, July 30, 1947, it was agreed between Mr. Penney and the writer, with the approval of the Court, that we should submit to you in letter form a statement of the nature of the authority of Myer Pransky in behalf of the defendant Dubuque Fire & Marine Insurance Company.

We have ascertained the nature of this authority and at the suggestion of Mr. Penney this letter is being directed to the Court at this time.

The defendant Dubuque Fire & Marine Insurance Company stipulates as follows:

"That Myer Pransky was designated an agent of the Dubuque Fire & Marine Insurance Company by filing a written designation as such with the Department of Insurance of the State of California; that such written designation does not set forth the nature of the agency or authority thereby conferred upon

Mr. Pransky; that there was no written agency contract between Mr. Pransky and Dubuque Fire & Marine Insurance Company; that Mr. Pransky was given verbal authority to solicit insurance in behalf of the Company and to place orders for insurance so solicited with the Dubuque Fire & Marine Insurance Company or its general agents for acceptance or rejection; that Myer Pransky had no [16] authority to 'bind' risks and no authority to counter-sign policies of insurance; that he did have authority to deliver policies to the assureds once the policies were written and that policies so written by the Dubuque Fire & Marine Insurance Company or its general agents were delivered by the latter to Mr. Pransky for delivery to the assureds."

Mr. Penney has accepted this stipulation and has requested that the writer transmit it to the Court in the present form.

If Mr. Penney is available to join in signing this letter we shall obtain his signature thereto although he has requested that we send it to the Court direct. If he is not available to sign it the writer requests by transmission to him of a duplicate of this letter that he telephone his approval to the Court's Secretary.

Respectfully submitted

ANGUS C. McBAIN

Attorney for Defendant Dubuque Fire & Marine
Insurance Company

Stipulation Accepted

GEORGE PENNEY

Attorney for Plaintiffs

[Endorsed]: Filed Aug. 5, 1947. Edmund L. Smith,
Clerk. [17]

MEMORANDUM DECISION

[Being the same as in Case No. 11775, which will be found at pages 12 to 16 of Transcript of Record.]

[Title of District Court and Cause]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

Come now the plaintiffs, by their attorney George Penney, and object to the Proposed Findings of Fact and Conclusions of Law heretofore submitted by the defendant's attorney, in the following particulars:

I.

Plaintiffs object to the findings set forth in paragraph VIII of said proposed findings of fact, commencing at line 28 and ending at line 31 on page 3, as said policy of insurance specifically insured the property described in the complaint. Plaintiffs further object to the remainder of the findings set forth in said paragraph VIII for the reason that in the stipulation entered into between the respective counsel the prorata share of each policy was to be determined in the event that the court found in favor of the plaintiffs. [24]

II.

Plaintiffs object to the findings set forth in paragraph IX of said proposed findings of fact relative to the alleged chattel mortgage executed and issued to Walter J. McCormick and Isabel McCormick mortgaging an undivided

one-third of the plaintiffs' property as security for the payment of rents to said mortgagees as owner of the building at 7519 Sunset Boulevard; and in this connection the plaintiffs request that the court specifically find that the plaintiffs were not delinquent at any time in the payment of rents and that said alleged chattel mortgage was not within the contemplation of the policy of insurance written by defendant.

Plaintiffs object to the remainder of said findings, commencing at line 2 and ending at line 10 on page 5, and request the court to specifically find that Myer Pransky, a soliciting agent of the defendant insurance company, had knowledge and notice of the existence of said chattel mortgages prior to the time and at the time of the writing of the policy of insurance.

III.

Plaintiffs object to the findings set forth in paragraph XIII of said proposed findings of fact and request the court to find that Myer Pransky, a soliciting agent of the defendant company, had full knowledge of the fact that the interest of the plaintiffs in the property was not sole and unconditional; and to further find that the defendant had knowledge of the existence of other interests at the time of the filing of the proof of loss; and that the court further find that the adjusting representatives of the defendant company, Dauerty & Dauerty, were apprised of the existence of the chattel mortgage to Edward A. Matlin at the time of the filing of the proof of loss and prior to the time of demand for appraisal; and further, that the

agents of the defendant company had constructive knowledge of the existence of the chattel mortgages executed by the plaintiffs, as said chattel mortgages were recorded on the [25] 22nd day of August 1945 in the office of the County Recorder of Los Angeles County.

IV.

Plaintiffs object to the findings set forth in paragraph XVI of said proposed findings of fact upon the ground that the alleged mortgage issued in favor of Walter J. McCormick and Isabel McCormick was not a mortgage within the contemplation of the policy, as the plaintiffs were never delinquent in the payment of rents. Plaintiffs specifically object to the remainder of said paragraph and request the court to find that the plaintiffs had an insurable interest in the property.

V.

Plaintiffs object to the findings set forth in paragraphs XVIII of said proposed findings of fact for the reason that the alleged mortgage to Walter J. McCormick and Isabel McCormick was not a mortgage within the contemplation of the policy; and further request the court to find that the existence of said chattel mortgages was known to Myer Pransky, soliciting agent of the defendant company, both prior to and at the time of the issuing of said policy.

VI.

Plaintiffs object to the findings set forth in paragraph XIX of said proposed findings of fact upon the ground

that Myer Pransky, soliciting agent of the defendant company, had knowledge of the existence of the chattel mortgages both before and at the time of the issuing of said policy of insurance.

Respectfully submitted,

GEORGE PENNEY

Attorney for Plaintiffs [26]

[Affidavit of Service by Mail.]

[Written]: Objections considered and overruled.

LRY, J.

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [27]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause having come on for trial in the above entitled Court on the 17th day of June, 1947, the Honorable Leon R. Yankwich, Judge Presiding, the plaintiffs Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, having appeared in person and by their attorney George Penney, Esq., and the defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, having appeared by its attorney Angus C. McBain, and the court having heard the evidence and the argument of counsel, and the matter having been there-

after submitted to the Court for decision, now therefore, the Court does hereby make its findings of fact as follows: [28]

FINDINGS OF FACT

I.

That all of the allegations, matters, and things contained in Paragraphs I, II, and III of plaintiffs' complaint are true.

II.

That all of the allegations contained in Paragraph IV of plaintiffs' complaint are true except that the Court does not determine the exact amount in controversy because it was agreed by the parties to the action that said amount would be determined by stipulation in the event the Court had found the remaining issues in favor of the plaintiffs.

III.

That all of the allegations, matters, and things contained in Paragraph V of the complaint are true.

IV.

That all of the allegations, matters, and things contained in Paragraph VI of plaintiffs' complaint are true and it is further true that said insurance policy was subject to various terms, conditions, and limitations contained therein and endorsed thereon.

V.

As to Paragraph VII of plaintiffs' complaint, it is true that on or about the 12th day of January 1946 a fire occurred on the premises occupied by the plaintiffs resulting in loss and damage to the property of the plaintiffs in the amount of \$26,880.23, but it is not true that

the insurance policy referred to in said complaint was in full force or effect or in force or effect at all at the time said fire and loss and damage occurred.

VI.

As to Paragraph VIII of plaintiffs' complaint, the Court finds that all of the allegations, matters, and things [29] therein contained are true except that the cash value of the different articles or properties and the amount of loss thereon were not as set forth in said written and sworn statement furnished by plaintiffs to defendant, nor were all of the incumbrances upon the said property specified in said statement. Because no evidence was presented as to the cash value of the different articles or properties or as to the amount of loss thereon, except for the appraisers' award in writing, the Court finds all allegations as to such cash value and as to the amount of loss, except as the loss is herein specifically determined, to be untrue.

VII.

That all of the allegations, matters, and things contained in Paragraph IX of plaintiffs' complaint are true.

VIII.

As to Paragraph X of plaintiffs' complaint, it is true that at the time of the issuing of the defendant's policy there was in existence a policy of insurance issued by the General Insurance Company of America in the amount of \$35,500.00 making a total insurance on the property of the plaintiffs in the amount of \$48,000.00 as long as both policies were in full force and effect. It is true that the policy of said General Insurance Company of America was worded to insure separately the food and liquor of

plaintiffs and that the loss to said food and liquor was, under the appraisal agreement, determined to be the sum of \$1,953.70. It is true that the policy of insurance of the defendant herein was worded to insure separately the tenants' improvements and that the loss of such tenants' improvements was, under the appraisal agreement, determined to be the sum of \$4,968.76. It is not true that either of said policies insured any of said properties at the time of the occurrence of the fire and loss and damage described in the complaint. The Court finds that it is not true that the pro rata share of this defendant of the balance of \$19,957.77 or of any [30] balance or sum, under the terms and conditions of the defendant's policy or otherwise, was 12.5/48ths of said sum of \$19,957.77, or of any sum, or that the defendant's pro rata share of said or any balance was \$5,197.34, or any sum, and it is not true that the total or any liability of defendant under its said policy of insurance was in the sum of \$10,166.10, or in any sum, and in this respect the Court finds that there was no liability on the part of the defendant under its said policy for any sum whatsoever to plaintiffs or either of them; the Court further finds that all allegations, matters, and things contained in said Paragraph X of plaintiffs' complaint inconsistent with or contrary to the findings made in this Paragraph VIII are untrue.

IX.

As to Paragraph XI of plaintiffs' complaint, the Court finds that at the time of the issuing of defendant's policy and at all times thereafter and at the time of the occurrence of the fire and loss and damage described in the complaint, the plaintiffs were not the sole and unconditional owners of the personal property located at 7519 Sun-

set Boulevard and that it is true that there was in full force and effect commencing on July 7, 1945, and at all times thereafter and at the time of the occurrence of and until after the occurrence of the fire and loss and damage described in plaintiffs' complaint, a chattel mortgage on all of plaintiffs said property issued, executed, and delivered by plaintiffs, as mortgagors, to Edward E. Matlin, as mortgagee. It is also true that commencing on July 7, 1945, and at all times thereafter and at the time of the occurrence of and until after the occurrence of the fire and loss and damage described in plaintiffs' complaint, there was in full force and effect a second chattel mortgage issued, executed and delivered by plaintiffs, as mortgagors, to Walter J. McCormick and Isabelle McCormick, as mortgagees, mortgaging an undivided one-third of all of plaintiffs said property, as security [31] for the payment of rents from plaintiffs to said mortgagees, the owners of the building at 7519 Sunset Boulevard. It is not true that these facts were known to the or any agents of this defendant, or that any agents of said defendant had any notice or knowledge of the existence of said chattel mortgages at the time of the writing of said defendant's policy of insurance, or at any time whatsoever. The Court finds all allegations, matters, and things contained in Paragraph XI of plaintiff's complaint which are inconsistent with or contrary to the findings made in this Paragraph IX to be untrue.

X.

As to Paragraph XII of plaintiffs' complaint, it is true that the chattel mortgages described in Paragraph IX of these findings were satisfied after the occurrence of the fire and loss and damage described in the complaint and prior to the commencement of this action, but it is not

true that the plaintiffs, or either of them, are now entitled to all amounts or any amounts under the defendant's policy and it is not true that there is any amount due to plaintiffs under said policy. The Court further finds that all allegations, matters, and things contained in said Paragraph XII of plaintiffs' complaint which are inconsistent with the findings herein specifically made are untrue.

XI.

As to Paragraph XIII of plaintiffs' complaint, it is not true that there is now due or owing, or ever was due or owing, from the defendant to the plaintiffs the sum of \$10,166.10, or any sum at all. It is true that plaintiffs heretofore made demand upon the defendant for said sum of \$10,166. 10 and that no part thereof has been paid.

XII.

As to Paragraph XIV of plaintiffs' complaint, it is true that defendant's policy of insurance contains, amongst other [32] things, the provision quoted in said Paragraph XIV, and it is true that the defendant refused payment of any sum to plaintiffs under defendant's policy of insurance because of said policy provision and because of other policy terms, provisions and conditions not referred to in said Paragraph XIV.

XIII.

As to Paragraph XV of plaintiffs' complaint, it is true that after the fire described in plaintiffs' complaint the defendant required plaintiffs to submit to an examination under oath and required plaintiffs to submit their loss to

an appraisal, and it is true that the defendant has not at any time cancelled its said policy or any part thereof and that it has retained the entire premium for said policy, but it is not true that the defendant had full or any knowledge of the fact that the interest of the plaintiffs was not that of sole and unconditional ownership at the time defendant required said examination under oath and appraisal, and as there is no evidence to show when the defendant might have acquired knowledge of said fact, the Court finds that said defendant had no knowledge whatsoever of the existence of other persons' interests in plaintiffs' property until served with summons and complaint in this action. The Court further finds that the defendant has not waived any of the terms and conditions of its policy and has not waived that portion of the terms and conditions of its policy which requires the interest of the insured to be unconditional and sole ownership.

XIV.

The Court finds that all allegations, matters, and things contained in plaintiffs' complaint which are contradictory of or inconsistent with the findings of fact herein made are untrue.

XV.

As to the First, Separate and Affirmative Defense to the complaint set forth in the defendant's answer on file herein, the [33] Court finds that all of the allegations, matters and things contained in Paragraph I thereof are true.

XVI.

As to Paragraph II of said First, Separate and Affirmative Defense, the Court finds it is true that at the time of the occurrence of the fire and loss and damage described in plaintiffs' complaint, the interest of the plaintiffs in the subject matter of the defendant's insurance policy was other than unconditional and sole ownership in that prior to the occurrence of the fire described in the complaint the plaintiffs as mortgagors did execute and deliver to and in favor of Edward E. Matlin, as mortgagee, a written chattel mortgage upon the property which was the subject of defendant's policy, and did also execute and deliver to and in favor of Walter J. McCormick and Isabelle McCormick, as mortgagees, a written chattel mortgage upon an undivided one-third of said property and that both of said chattel mortgages were at all times after their execution and delivery and at the time of and until after the occurrence of the fire and loss and damage described in plaintiffs' complaint, in full force and effect, and the holders or mortgagees of said chattel mortgages at all of said times had an interest in said property.

XVII.

As to Paragraph I of the Second, Separate and Affirmative Defense to plaintiffs' complaint set forth in defendant's answer herein, the Court finds that it is true that by the terms and provisions of the defendant's policy of insurance sued upon herein, it was provided amongst other things:

"Unless otherwise provided by agreement in writing indorsed hereon or added hereto, this company

shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage . . .” [34]

XVIII.

As to Paragraph II of said Second, Separate and Affirmative Defense, the Court finds all of the allegations, matters, and things therein contained are true, and it is true that at the time of the occurrence of the fire and loss and damage described in plaintiffs’ complaint the property described and insured by defendant’s policy of insurance was incumbered by chattel mortgages and that prior to the occurrence of said fire the plaintiffs, as mortgagors, did execute and deliver to Edward E. Matlin, as mortgagee, a written chattel mortgage upon all of said property and did execute and deliver, as mortgagors, to Walter J. McCormick and Isabelle McCormick, as mortgagees, a written chattel mortgage upon an undivided one-third of said property, and that said chattel mortgages were at all times after their execution and delivery aforesaid, and at the time of and until some time after the occurrence of said fire and loss and damage, in full force and effect.

XIX.

It is true that there was never any provision by agreement in writing endorsed on the defendant’s policy or added thereto, or otherwise, for said or any chattel mortgages, and that the defendant had no knowledge or notice of said chattel mortgages until after the occurrence of said alleged fire and loss and damage.

From its findings of fact aforesaid and the law the Court hereby makes the following:

CONCLUSIONS OF LAW

I.

That the defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, is entitled to judgment that the plaintiffs Laura Gawrecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, take [35] nothing against said defendant and that the said defendant have and recover from said plaintiffs its costs and disbursements herein.

Done in open court this 19th day of August, 1947.

LEON R. YANKWICH

Judge

Approved as to Form under Rule No. 7.

Attorneys for Plaintiffs

Disapproved as to Form.

GEORGE PENNEY

Attorney for Plaintiffs

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [36]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 5869-Y

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,

Plaintiffs,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-
PANY OF DUBUQUE, IOWA, a corporation,

Defendant.

JUDGMENT

The above entitled cause having come on for trial in the above entitled Court on the 17th day of June, 1947, the Honorable Leon R. Yankwich, Judge Presiding, the plaintiffs Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, having appeared in person and by their attorney George Penney, Esq., and the defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, having appeared by its attorney Angus C. McBain and the court having heard the evidence and the argument of counsel, and the matter having been thereafter submitted to the Court for decision, and the Court having made its findings of fact and conclusions of law

herein, now therefore, in accordance with the facts and the law:

It Is Hereby Ordered, Adjudged and Decreed that the [37] defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, have judgment that the plaintiffs Laura Gawrecki and Collette Mitre, doing business unde the fictitious name of Skylark Cafe & Restaurant, take nothing against said defendant and that the said defendant have and recover from said plaintiffs its costs and disbursements herein.

Done in open court this 19th day of August, 1947.

LEON R. YANKWICH

Judge

Approved as to Form under Rule No. 7.

GEORGE PENNEY

Attorney for Plaintiffs

Judgment entered Aug. 19, 1947. Docketed Aug. 19, 1947. C. O. Book 44, page 711. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [38]

[Title of District Court and Cause]

NOTICE OF ENTRY OF JUDGMENT

To the Plaintiffs Above Named and to George Penney,
Esq., Their Attorney:

Please take notice that on August 19, 1947, the above entitled Court did file and enter judgment in the above entitled cause in Civil Order Book 44 at page 711, that the defendant Dubuque Fire and Marine Insurance Company of Dubuque, Iowa, a corporation, have judgment that the plaintiffs Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, take nothing against said defendant and that said defendant have and recover from said plaintiffs its costs and disbursements herein.

Dated at Los Angeles, California, this 21st day of August, 1947.

ANGUS C. McBAIN

Attorney for Said Defendant [39]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 22, 1927. Edmund L. Smith,
Clerk. [40]

[Title of District Court and Cause]

MOTION FOR A NEW TRIAL, MOTION TO
AMEND FINDINGS OF FACT AND CONCLU-
SIONS OF LAW AND DIRECT THE ENTRY
OF A NEW JUDGMENT

Come now the plaintiffs, by their attorney George Penney, and file this their written motions as follows, to wit:

Their Motion for New Trial in the Above Entitled Matter:

Said motion is based upon the following grounds, and each of them:

1. That errors of law appear upon the face of the record.

2. That it appears from the pleadings and the evidence in this case that an erroneous judgment has been rendered.

3. That it is manifest from the pleadings and evidence in this case that justice has not been attained by the judgment rendered therein.

4. That the findings of fact are not supported by the evidence. [41]

5. That the judgment is not supported by the evidence.

6. That the findings of fact are insufficient to support the conclusions of law.

7. That the findings of fact and conclusions of law are insufficient to support the judgment rendered therein.

8. That the conclusions of law are insufficient to support the judgment rendered therein.

Their Motion to Amend Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment in the Above Entitled Matter:

Said motion is based upon the following grounds, and each of them:

1. That it appears from the pleadings and the evidence in this case that the court should have found that the plaintiffs were entitled to judgment against the defendant.

2. That it appears from the pleadings and evidence in this case that the plaintiffs were without fault and that the defendant is estopped from denying liability under the terms and conditions of the insurance policy issued by it to the plaintiffs.

3. That the judgment in the above-entitled matter should have been in favor of the plaintiffs and against the defendant.

Said motions and each and all of them will be based upon the files, records, documents, evidence, including reporter's transcript and exhibits received in evidence, and memoranda of counsel heretofore filed in the above-entitled action.

Dated, this 25th day of August 1947.

GEORGE PENNEY

Attorney for Plaintiffs [42]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 25, 1947. Edmund L. Smith, Clerk. [43]

[Minutes: Friday, August 29, 1947]

[Being the same as in Case No. 11775, which will be found at page 32 of Transcript of Record.]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Defendant Above Named, and to Its Attorney
Angus C. McBain:

Notice Is Hereby Given That Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, plaintiffs in the above-entitled action, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the within action on the 19th day of August 1947, and from the order of the court in said action denying plaintiffs' motion for new trial, motion to amend the findings of fact and conclusions of law and direct entry of a new judgment, and motion to correct findings.

Dated: October 7, 1947.

GEORGE PENNEY and
ROBERT M. NEWELL

By George Penney
Attorneys for Plaintiffs

[Endorsed]: Filed & mld. copy to Angus C. McBain, atty. for deft., Oct 7, 1947. Edmund L. Smith, Clerk. [45]

4879700

In the District Court of the United States for the
Southern District of California
Central Division

No. 5869-Y Civil

LAURA GAWECKI and COLLETTE MITRE, doing
business under the fictitious name of SKYLARK
CAFE & RESTAURANT,

Plaintiffs

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-
PANY OF DUBUQUE, IOWA, a corporation,
Defendant.

STIPULATION FOR COSTS

Know All Men By These Presents, That we, Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe.& Restaurant, as Principals, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and authorized to act as surety under the Act of Congress approved August 13, 1894, whose principal office is located in Baltimore, Maryland, as Surety, are held and firmly bound unto the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, in the full and just sum of Two Hundred Fifty and No/100 Dollars (\$250.00), lawful money of the United States, to be paid to the said Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The Condition of This Obligation Is Such, that

Whereas, the above named Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, Plaintiffs herein, have appealed, or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in favor of the Defendant in [46] the above entitled Court and in the above entitled action on or about the 19th day of August, 1947.

Now, Therefore, in consideration of the premises and of such appeal, if the said Plaintiffs, Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, shall prosecute their appeal to effect, and pay all costs that may be adjudged against them or either of them if the appeal is dismissed or the judgment is modified, then the above obligation to be void; otherwise to remain in full force and virtue, and in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten (10) days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 15th day of September, 1947.

SKYLARK CAFE & RESTAURANT

By Laura Gawecki

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

By Robert Hecht—Attorney in Fact

Attest S. M. Smith—Agent

State of California,
County of Los Angeles—ss:

On this 15th day of September, 1947, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert Hecht, known to me to be the Attorney-in-Fact, and S. M. Smith, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

(Seal) THERESA FITZGIBBONS
Notary Public in and for the County of Los Angeles,
State of California.

My Comission Expires May 3, 1950.

Examined and recommended for approval as provided in Rule 8. Angus C. McBain, Attorney; George Penney.

Approved this 7 day of Oct., 1947. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Edw. F. Drew, Deputy.

The premium charged for this bond is \$10.00 per annum.

[Endorsed]: Filed Oct. 7, 1947. Edmund L. Smith, Clerk. [47]

[Title of District Court and Cause]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY IN THE APPEAL IN THIS CASE

I.

That the findings of fact do not support the conclusions of law or judgment in said case in that:

- A. The plaintiffs sustained an actual loss which was intended to be covered under the insurance policy issued by the defendant.

II.

That the judgment is contrary to law in that:

- A. The defendant by its actions has waived the terms and conditions of said insurance policy which provide that the interest of the insured be sole and unconditional; [48]
- B. The defendant by its actions has waived the provision requiring a chattel mortgage endorsement on said policy while the property is encumbered by a chattel mortgage;
- C. The defendant is estopped from setting up as a defense that the interest of the insured was other than sole and unconditional ownership;
- D. The defendant is estopped from setting up as a defense that the insurance policy did not have an endorsement clause while said property was encumbered by a chattel mortgage;
- E. Said judgment is contrary to the applicable laws of the State of California and of the United States of America.

III.

That the evidence is insufficient to sustain the findings of fact of the trial court.

IV.

That the trial court erred in denying plaintiffs' motion for a new trial.

V.

That the court erred in denying plaintiffs' motion to amend findings of fact and conclusions of law and direct the entry of a new judgment.

VI.

That the court erred in denying plaintiffs' motion to correct the findings.

Dated: October 7, 1947.

GEORGE PENNEY &
ROBERT M. NEWELL

By George Penney

Attorneys for Plaintiffs [49]

Received copy of the within Statement of Points this 7 day of October, 1947. Angus C. McBain, Attorney for Dubuque Fire & Marine.

[Endorsed]: Filed Oct. 7, 1947. Edmund L. Smith. Clerk. [50]

[Title of District Court and Cause]

STIPULATION

It Is Hereby Stipulated by and between plaintiffs and defendant, through their respective attorneys George Penney and Robert M. Newell and Angus McBain, that the original exhibits in the above-entitled action may be sent to the Clerk of the Circuit Court of Appeals and that the court may enter an order directing the Clerk of the United States District Court to forward the original exhibits to the Clerk of the Circuit Court of Appeals.

Dated: October 21, 1947.

GEORGE PENNEY &
ROBERT M. NEWELL

By George Penney

Attorneys for Plaintiffs

ANGUS C. McBAIN

Attorney for Deft. [54]

ORDER

In accordance with the foregoing stipulation, the Clerk is hereby ordered and directed to forward the original exhibits in the above-entitled action to the Clerk of the Circuit Court of Appeals in connection with the appeal in this action.

Oct. 22, '47.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith,
Clerk. [55]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 55, inclusive, contain full, true and correct copies of Complaint for Damages Under Fire Insurance Contract; Answer; Letter from Angus C. McBain to Hon. Leon R. Yankwich dated August 4, 1947; Memorandum Decision; Objections to Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Notice of Entry of Judgment; Motion for a New Trial, Motion to Amend Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment; Minute Order Entered August 29, 1947; Notice of Appeal; Stipulation for Costs; Statement of Points Upon Which Appellants Intend to Rely; Designation of Record on Appeal and Stipulation and Order re Original Exhibits which, together with copy of Reporter's Transcript of Proceedings on June 17, 1947 and Original Plaintiffs' Exhibits 1 to 11, inclusive and original Defendant's Exhibits A and B, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$13.85 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court
this 31 day of October; A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

REPORTER'S TRANSCRIPT OF PROCEEDINGS

[Being the same as in Case No. 11775, which will be
found at pages 41 to 70 of Transcript of Record.]

[Endorsed]: No. 11776. United States Circuit Court
of Appeals for the Ninth Circuit. Laura Gaweckie and
Collette Mitre, doing business under the fictitious name of
Skylark Cafe & Restaurant, Appellants, vs. Dubuque Fire
& Marine Insurance Company of Dubuque, Iowa, a cor-
poration, Appellee. Transcript of Record. Upon Appeal
From the District Court of the United States for the
Southern District of California, Central Division.

Filed November 3, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11775

LAURA GAWECKI and COLLETTE MITRE, dba
SKYLARK CAFE & RESTAURANT,
Appellants,

vs.

GENERAL INSURANCE COMPANY OF
AMERICA,

Appellee.

No. 11776

LAURA GAWECKI and COLLETTE MITRE, dba
SKYLARK CAFE & RESTAURANT,
Appellants,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-
PANY OF DUBUQUE, IOWA,
Appellee.

Upon Appeals From the District Court of the United
States, for the Southern District of California,
Central Division

APPLICATION FOR ORIGINAL EXHIBITS TO
BE CONSIDERED IN ORIGINAL FORM
WITHOUT PRINTING

Come now the appellants by their attorneys George
Penney and Robert M. Newell and make formal applica-
tion that the original exhibits in the above-entitled causes
may be considered in their original form without printing.

Respectfully submitted,

GEORGE PENNEY and
ROBERT M. NEWELL

By George Penney

Attorneys for Appellants

So Ordered:

FRANCIS A. GARRECHT

Senior United States Circuit Judge

[Endorsed]: Filed Nov. 13, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Causes]

No. 11775 No. 11776

STATEMENT OF POINTS ON APPEAL

Come now the appellants, by their attorneys, and in lieu of filing a statement of points upon which they intend to appeal, adopt the statement of points filed with the Clerk of the trial court in the District Court of the United States, Southern District of California, Central Division.

Dated: October 27, 1947.

GEORGE PENNEY and
ROBERT M. NEWELL

By George Penney

Attorneys for Appellants

Received copy of the within Statement of Points on Appeal October, 1947. Hindman & Davis, by E. Eugene Davis, Attorneys for Appellee General Insurance Co.; Angus C. McBain, Attorney for Appellee Dubuque Fire & Marine Ins. Co.

[Endorsed]: Filed Nov. 13, 1947. Paul P. O'Brien,
Clerk.

Nos. 11775 and 11776.

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

No. 11775

LAURA GAWECKI and COLLETTE MITRE, doing business
under the fictitious name of SKYLARK CAFE & RESTAU-
RANT,

Appellants,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corpora-
tion,

Appellee.

No. 11776

LAURA GAWECKI and COLLETTE MITRE, doing business
under the fictitious name of SKYLARK CAFE & RESTAU-
RANT,

Appellants,

vs.

DUBUQUE FIRE AND MARINE INSURANCE COMPANY OF
DUBUQUE, IOWA, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

GEORGE PENNEY,

939 Rowan Building, Los Angeles 13.

ROBERT M. NEWELL,

1111 Wm. Fox Building, Los Angeles 14,

Attorneys for Appellants,

TOPICAL INDEX

	PAGE
Statement of pleadings and facts disclosing jurisdiction of the District Court	1
Jurisdiction of Circuit Court of Appeal.....	2
Statement of the case.....	2
Summary of appellants' argument.....	4
Specification of errors.....	5
Summary of evidence.....	5
The existence of a chattel mortgage on property covered by fire insurance does not void the policy under the so-called chattel mortgage clause, where there was no inquiry by the insurance company	8
Insurance contracts should be construed to protect the interests of the assured wherever possible.....	25
The cases relied on by the District Court in reaching its decision may be distinguished from the case at bar on the ground that in the former the insured did something after the policy had been issued, which changed the risk which the insurer had accepted	29
Conclusion	31

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Credit Indemnity Company v. N. K. Mitchell & Co., 78 F. (2d) 276.....	27
Ames v. Employers' Casualty Co., 16 Cal. App. (2d) 255.....	24
Bass v. Farmers' Mutual Protective Fire Ins. Co., 21 Cal. App. (2d) 26	21, 22
Dunne v. Phoenix Ins. Co. of Hartford, Conn., 113 Cal. App. 256	21
Glickman v. New York Life Ins. Co., 16 Cal. (2d) 626.....	25, 26
Goorberg v. Western Assurance Company, 150 Cal. 510.....	27
Grant v. Sun Indemnity Co., 11 Cal. (2d) 438.....	26
Hargett v. Gulf Ins. Co., 12 Cal. App. (2d) 449.....	29, 30, 31
Hutchings v. Southwestern Automobile Ins. Co., 96 Cal. App. 318	24
Kahn v. Commercial Union Fire Ins. Co., 16 Cal. App. (2d) 42	21
Kansas City Life Ins. Co. v. Davis, 95 F. (2d) 952.....	26
Kavanaugh v. Franklin Fire Insurance Co., 185 Cal. 307.....	19
Koshland v. Hartford Ins. Co., 31 Ore. 402.....	20
Morrison v. Tennessee M. and F. Ins. Co., 18 Mo. 262, 59 Am. Dec. 299.....	20
New York Life Ins. Co. v. Eggleston, 96 U. S. 572.....	26
Niagara F. Ins. Co. v. Layne, 162 Ky. 665, 172 S. W. 1090.....	20
O'Brien v. Ohio Ins. Co., 52 Mich. 131, 17 N. W. 726.....	20
Raulet v. Northwestern National Insurance Company of Mil- waukee, 157 Cal. 213.....	9, 18, 29, 30, 31
Sam Wong v. Stuyvesant Insurance Company, 100 Cal. App. 109	23
Steil v. Sun Ins. Office, 171 Cal. 795.....	30, 31

Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507.....	28
---	----

STATUTES

United States Code Annotated, Title 28, Sec. 41.....	2
United States Code Annotated, Title 28, Sec. 225.....	2

TEXTBOOKS

13 Appleman, Insurance Law and Practice (1943), Sec. 7385, p. 37	26
20 California Law Review 1, 40-41, Langmaid, Waiver and Estoppel in Insurance Law.....	27
Cooley's Briefs on the Law of Insurance, p. 1369.....	28
7 University of Pittsburg Law Review 148-150.....	27

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11775

LAURA GAWECKI and COLLETTE MITRE, doing business
under the fictitious name of SKYLARK CAFE & RESTAU-
RANT,

Appellants,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corpora-
tion,

Appellee.

No. 11776

LAURA GAWECKI and COLLETTE MITRE, doing business
under the fictitious name of SKYLARK CAFE & RESTAU-
RANT,

Appellants,

vs.

DUBUQUE FIRE AND MARINE INSURANCE COMPANY OF
DUBUQUE, IOWA, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdic-
tion of the District Court.

Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, filed two separate actions against the respective appellees for money alleged to be due them under a fire insurance contract, in the District Court of the United States, Southern

District of California, Central Division. It was alleged in each case that the District Court had jurisdiction because the controversy was of a civil nature and wholly between citizens of different states, and that the amount in controversy exceeded the jurisdictional minimum of \$3,000.00, exclusive of interests and costs.

On the basis of these allegations, the District Court had jurisdiction under the provisions of 28 U. S. C. A., section 41. By stipulation of counsel, the two cases were consolidated for trial in the District Court.

Jurisdiction of Circuit Court of Appeal.

This Honorable Court has jurisdiction to review the judgment rendered in favor of the Dubuque Fire and Marine Insurance Company of Dubuque, Iowa, and the General Insurance Company of America by said District Court under the provisions of 28 U. S. C. A., section 225.

Statement of the Case.

Plaintiffs filed two separate actions against the respective defendant fire insurance companies. These cases were later consolidated for trial in the District Court, and, by stipulation heretofore filed, have been consolidated for hearing before this Court. The two complaints are identical in form and allege in substance that the plaintiffs were partners in the operation of the Skylark Cafe and Restaurant, located at 7519 Sunset Boulevard, Los Angeles, California; that the defendants issued fire insurance policies on the standard California form by which it insured the furniture, fixtures and equipment of the plaintiffs' restaurant; that on or about the 12th day of January, 1946, a fire occurred on the premises, resulting in loss and damage to the plaintiffs in the amount of \$26,880.23; that

due proof of loss had been made, but that each defendant had refused to pay its ratable share of the loss. In each complaint it was alleged that, at the time the policies were issued, there was in full force and effect a chattel mortgage on the property issued by the plaintiffs to Walter J. McCormick and Edward A. Matlin, and a further lien in favor of Leo Kanner and Bertha Kanner to secure the payment of rent, and it was further alleged that agents of each defendant knew of these encumbrances at the time the insurance was issued. [Tr. p. 5.] The complaint against the Dubuque Fire and Marine Insurance Company prayed for judgment in the sum of \$10,166.10; and the complaint against the General Insurance Company of America prayed for judgment in the sum of \$20,388.95.

Each defendant answered the complaint addressed to it, and these answers are identical for all purposes. They admit the issuance of each policy to the plaintiffs, and that there was a fire on the premises; they deny that any agents of the defendant had any knowledge of any encumbrances on the property when the insurance was issued, and each defendant denies any liability to the plaintiffs; moreover, each answer sets up two affirmative defenses: (1) that the sole and unconditional ownership clause of the policy was violated, (2) that the chattel mortgage clause of each policy was violated. [Dubuque's Tr. pp. 11, 12; General's Tr. pp. 9-11.]

There was no dispute as to the amount of loss sustained by the plaintiffs, as it was stipulated that this amount had been determined by appraisal in accordance with each policy. [General's Tr. p. 48.]

The cases were tried by the court without a jury; the court rendered judgment for each defendant as prayed. [Dubuque's Tr. pp. 29-30; General's Tr. p. 28.]

Thereafter, the plaintiffs made a motion for a new trial and also a motion to amend the findings of fact and conclusions of law and to direct the entry of a new judgment in each case. [Dubuque's Tr. pp. 32-33; General's Tr. pp. 30-32.] Each of these motions was denied. [General's Tr. p. 32.]

Thereupon, within the time allowed by law, this appeal followed.

Summary of Appellants' Argument.

The foregoing facts raise one basic issue: Where property to be insured is encumbered at the time the insurance is written, can the insurer avoid liability for a valid claim of loss on the ground that these encumbrances violate certain provisions of the policy, when the insurer has made no inquiries of the insured regarding any encumbrances?

In submitting this question to this Court, the appellants take the position that the foregoing question must be answered in the negative and the judgment of the District Court reversed for the following reasons:

(1) Where there was no inquiry by the insurance company, the existence of a chattel mortgage on the property covered by fire insurance does not void the policy under the so-called chattel mortgage clause.

(2) Insurance contracts should be construed to protect the interests of the assured whenever possible.

(3) The cases relied on by the District Court in reaching its decision are distinguishable from the case at law on the ground that in the former the insured did something after the policy had been issued, which changed the risk which the insurer had accepted.

Specification of Errors.

Appellants hereby make the following specifications of error:

1. That the evidence is insufficient to sustain the findings of fact, conclusions of law and judgment.
2. That the trial court erred as follows:
 - (a) In denying appellants' motions for a new trial.
 - (b) In denying appellants' motions to amend the findings of fact and conclusions of law and to direct the entry of a new judgment.

Summary of Evidence.

In May, 1945, Laura Gawecki, a widow 62 years of age, purchased the Skylark Cafe and Restaurant located at 7519 Sunset Boulevard, Los Angeles, California, which she planned to operate with her daughter, Collette Mitre. Prior to this time, Mrs. Gawecki had never had any business experience of any kind whatsoever. [Tr. p. 68.] She made a down payment on the purchase and executed a chattel mortgage in favor of the vendors, Walter J. McCormick and Edward A. Matlin, to secure the payment of the balance of the purchase price. She also executed what purported to be another chattel mortgage in favor of Leo and Bertha Kanner, the owners of the building at 7519 Sunset Boulevard, to secure payment of the monthly rental.

The rent was never delinquent at any time. [Tr. p. 69.] These mortgages were on the property when the respective insurance policies, that are the basis of this action, were issued. They were recorded on August 22, 1945, shortly after the issuance of the policies.

Mrs. Gawecki contacted Miss Loraine O'Rourke, an insurance agent whom she had known for approximately 25 years, to handle the matter of fire insurance for her. Miss O'Rourke knew that the premises to be covered by fire insurance were subject to the aforementioned chattel mortgages [Tr. pp. 52-53]; indeed, sometime prior to this time, Mrs. Gawecki had published a notice of intention to mortgage in accordance with section 3440 of the Civil Code of the State of California. [Tr. p. 66.]

Miss O'Rourke was not an agent of the Dubuque Fire and Marine Insurance Company, but she was made an agent by the General Insurance Company of America on June 26, 1945, prior to issuance of the insurance in question by that company. [Tr. p. 53.]

When Mrs. Gawecki bought the restaurant, the property in question had previously been covered by several policies of fire insurance, including a policy issued by the appellee Dubuque Fire and Marine Insurance Company. [Tr. p. 54.] However, Miss O'Rourke felt that the property was overinsured so she cancelled several policies, but she decided to retain the policy written by the Dubuque Fire and Marine Insurance Company, and had it rewritten in favor of the new owner, Laura Gawecki. She also ordered another policy, the one issued by the General Insurance Company. The Dubuque policy was procured through one Meyer Pransky, a soliciting agent of that company, who discussed the property and insurance with Miss O'Rourke, and who had access to the escrow instructions of the sale to Mrs. Gawecki, which instructions contained detailed information about the encumbrances. [Tr. p. 5.] Miss O'Rourke contacted the Republic Insurance Company as regards the other policy, and, after being assured that the risk was covered, by a Mr. Sharp of that organization, she later received the policy of

insurance written by the General Insurance Company of America. She had no direct dealings with any representative of this latter insurance company at any time. Neither company made any inquiries whatsoever regarding the property or the nature of the risk, nor did they require or request a written application for insurance. The Dubuque Fire and Marine Insurance Company issued a policy of fire insurance No. 1362125 insuring the premises for \$12,500.00, and received a premium of \$150.61 as consideration therefor. The General Insurance Company of America issued a policy of fire insurance No. 2727-F-7909 insuring the premises for \$35,000.00 and received a premium of \$468.60 as consideration therefor. Miss O'Rourke turned the policies over to Mrs. Gawecki, who put them away without reading them.

On January 11, 1946, the property covered by the aforementioned insurance policies was damaged by fire in the amount of \$26,880.23 [Tr. p. 21], a figure arrived at by appraisal at the request of the appellees and in accordance with the provision of these policies, which are the standard fire insurance policies required by the California Insurance Code, sections 2070 and 2071. Sometime after the fire, Mrs. Gawecki paid off the balance owing on the purchase price and got a full release from the vendors and mortgagees.

Due proof of loss was made, but the insurance companies refused to pay their respective shares of the loss on the ground that the following two provisions of the policies were violated:

- (1) "Unless otherwise provided by agreement endorsed hereon or added hereto, this entire policy shall be void, . . . if the interest of the insured be other than unconditional and sole ownership. . . ."

- (2) "Unless otherwise provided by agreement in writing endorsed hereon or added hereto, this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage."

The case was heard by Honorable Leon Yankwich of the Federal District Court for the Southern District of California, Central Division, who found for the defendant fire insurance companies on the ground that the existence of the chattel mortgages on the property when the insurance was issue voided any liability on the part of the defendants.

The Existence of a Chattel Mortgage on Property Covered by Fire Insurance Does Not Void the Policy Under the So-called Chattel Mortgage Clause, Where There Was No Inquiry by the Insurance Company.

Before examining the effect of the chattel mortgage executed in favor of the vendors to secure the payment of the balance of the purchase price, the matter of the so-called chattel mortgage to secure the payment of the rent may be quickly disposed of. It is to be remembered that the rent was never delinquent at any time. Under such circumstances, the California Supreme Court long ago held that such an instrument did not constitute such an encumbrance as would void the policy under a chattel mortgage clause. This proposition is succinctly stated in the syllabus of the case of *Raulet v. Northwestern Na-*

tional Insurance Company of Milwaukee, 157 Cal. 213, as follows:

“A clause in a fire insurance policy on furniture, which voids the policy if the property be or become encumbered with a chattel mortgage, relates only to an ordinary chattel mortgage which in fact encumbers the property, and does not apply to a chattel mortgage in form, which is a mere security for rent or in the nature of a bond to become effective only in the case of the non-payment of rent.”

This conclusion is in accordance with accepted dogma of the law of mortgages to the effect that there can be no mortgage in the absence of an outstanding obligation to support the mortgage. If the rent is not delinquent, it follows that there can, therefore, be no mortgage in the true sense of the word.

A more fundamental problem is presented by the chattel mortgage given to the vendors, as mortgagees, to secure the balance of the purchase price. This is a valid chattel mortgage, and presents the primary problem involved in this appeal: Can a fire insurance company avoid liability for a fire loss on the ground that the property insured was subject to a chattel mortgage at the time the policy was issued, where it made no inquiry of the assured as to any encumbrances on the property, or does this failure to inquire amount to a waiver of the chattel mortgage clause?

The aforementioned case of *Raulet v. Northwestern National Insurance Company*, *supra*, is an exhaustive examination of the law on the point and presents a comprehensive statement of the position of the California courts on the subject. Indeed, this decision is such a clear exposition of the law and the rationale behind the law that

the appellants feel compelled to quote from the case at some length, commencing on page 227 of the decision:

“In Cooley’s briefs on the Law of Insurance, page 1369, it is stated that ‘Insurance policies generally contain a clause reciting that the policy shall be void if the insured’s interest is other than sole and unconditional, or entire, sole, and unconditional ownership, and this is not expressed in the policy. . . . Its purpose is to prevent a party who has an undivided or contingent but insurable interest in property from appropriating to his own use the proceeds of the policy taken on the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud and crime. It therefore follows that the clause is in most cases held to refer to the character and quality of the title—to the actual and substantial ownership, rather than to the strictly legal title. In other words, the insured’s interest must be of such nature that he will sustain the whole loss if the property is destroyed.’

“In *Miller v. Alliance Ins. Co. of Boston*, 7 Fed. 649, it is held that so long as the assured, under claim of right, had the exclusive use and enjoyment of the insured property, without any assertion of an adverse right or interest in it by any other person, he had the insurable interest under the sole and unconditional ownership clause. So here, the entire loss was sustained by plaintiff, and it seems to be the narrow view that would defeat the claim on the ground that within the contemplation of the policy she was not ‘the sole and unconditional owner.’

“In *Breedlove v. Norwich etc. Ins. Society*, 124 Cal. 169 [56 Pac. 772], it is said: ‘Notwithstanding the fact, then, that plaintiff’s interest in the property

was not that of a sole and unconditional owner, nevertheless she did have an insurable interest which will support her action.' However, the judgment in the Breedlove case was upheld upon the ground of waiver by the insurance company.

"In *Sharp v. Scottish Union etc. Co.*, 136 Cal. 542 [69 Pac. 253], it is held, as stated in the syllabus, that: 'Where there was no fraud, false swearing, concealment, or misrepresentation by the applicant for a policy of fire insurance which made the loss payable to a mortgagee, and the policy was written by an agent of the company, who delivered it to a representative of the mortgagee, and a full premium was paid and retained by the insurance company without offer of rescission after knowledge of the facts, and the assured person had an insurable interest in the property, though his wife was the owner of an undivided half interest therein, the policy may be enforced by the mortgagee, notwithstanding a clause that if the interest of the insured be other than unconditional, and sole ownership the policy should be void.' While, of course, the case can be differentiated from this, as the facts are somewhat dissimilar, yet it involves a stricter construction of the policy against the insurance company than what is insisted upon here by the respondent. In the Sharp case is cited with approval the following quotation from *Manchester Assurance Co. v. Abrams*, 89 Fed. 932 [32 C. C. A. 426]: 'Sound reason, as well as the weight of authority, inclines us to the view that where the assured has an insurable interest in the property, and in good faith applies for insurance upon the same, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest, and issues a policy to him,

and accepts and retains his premium, the company must be presumed to have knowledge of the condition of his title and to assure the property with such knowledge.'

"In the case at bar there was no actual nor constructive fraud, no intentional misrepresentation nor concealment, no inquiry on the part of the insurance company; the plaintiff was really vested with the title, the entire loss was sustained by her, and it cannot be held that the policy was void by virtue of the sole and unconditional ownership clause.

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"The question arising from the chattel mortgage is less free from difficulty. The provision in the policy as to that is: 'This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto shall be void . . . if the subject of insurance be personal property and be or become encumbered with a chattel mortgage.' There is also the general provision that 'This policy is made and accepted subject to the foregoing stipulations and conditions,' etc.

"There was in fact a chattel mortgage upon the property to secure the payment of the rent for the building, but the court found in relation thereto 'That the said instrument executed by plaintiff and her husband to the said Aronson was not a chattel mortgage within the meaning of defendant's policy; that at no time from the date said instrument was executed was there any rent overdue from the lessees above named; that at no time was said instrument considered by said plaintiff as a chattel mortgage; that when the plaintiff applied, through the said George Quarre, to defendant for insurance on the said property, no inquiries were made by the said

defendant as to whether or not the said property was encumbered by a chattel mortgage, nor were any representations made by the said Quarre as plaintiff's agent, to the effect that the property was not so encumbered; that the provision in defendant's policy relating to chattel mortgages was not a material part of said policy.' The conclusion is therefrom drawn that there was no violation of this provision of the policy and 'that said defendant waived the last-mentioned clause by its conduct when application was made therefor; and that defendant is estopped by its own acts from now setting up the said clause as a defense to plaintiff's claim in this action.' . . .

"We think, however, that under the circumstances it should be held that this provision in the policy was waived by the conduct of defendant.

"There was no written application for the insurance, and, as we have seen, no actual fraud and no intentional misrepresentation by plaintiff. She was ignorant of this provision in the policy, which was secured by her agent, and no inquiry was made by the company as to the existence of any chattel mortgage.

"It must be presumed, ordinarily, that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions therein, but the rule should not be strictly applied to insurance policies. It is a matter almost of common knowledge that a very small percentage of policy-holders are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and

voluminous—the one before us covering thirteen pages of the transcript—and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policy-holder such provisions as the one before us.

“The courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent. The defendant should either have made inquiries in reference to the chattel mortgage, required a written application covering by question and answer all the material provisions of the policy, or have consulted the records in the recorder’s office where it would have been apprised of the encumbrance.

“Considering the nature of the contract and the relation of the parties, there should be no difficulty in reaching the conclusion that this provision was waived and it therefore constitutes no bar to recovery.

“In Cooley’s briefs on Insurance, page 1396, it is said: ‘The authorities are far from being agreed as to the necessity of disclosure, in the absence of inquiry, when the policy contains a stipulation declaring it void if the property is encumbered, and not so represented to the insurer. It has, however, been held in numerous well-considered cases that even if the policy contains a condition declaring it to be void if the interest of the insured be not fully stated, or if the property is encumbered and not so represented, or if the subject of insurance be personal property and be encumbered by a chattel mortgage, disclosure

is not necessary, in the absence of inquiry.' And further: 'That a disclosure of encumbrances is not necessary under a condition calling for a representation as to title or interest, if not absolute in fee simple, or sole and unconditional, seems to be supported by the weight of authority.'

"In *Wright v. Fire Ins. Assoc.*, 12 Mont. 485 [31 Pac. 91], the supreme court of Montana, discussing a similar provision, says: 'According to defendant's position, only one condition of said contract of insurance was ever in force, and that was the clause providing that inasmuch as a portion of the property which defendant pretended to insure was mortgaged—a fact which existed and had not been made a condition of the agreement as negotiated—the policy was entirely void *ab initio*. If this interpretation is the proper one to be upheld by the court its result is that plaintiff negotiated for insurance on her property, truly answering to all inquiries that were made concerning it; defendant promised to place a risk upon it for a certain consideration and received \$105 from plaintiff for a paper which provided that she had no insurance, and this result was not according to the negotiations, because no inquiry was made as to a mortgage. No mention was made that the company would not take a risk on mortgaged property. . . . It seems to us that it would be unjust to the insurer, as well as the assured, to put such a construction on the transaction. It would be imputing turpitude to the conduct of defendant which the transaction hardly warrants, when we consider the conduct of the parties at the time the insurance contract was made as shown by the evidence. It would be assuming that the defendant was in such case obtaining, or attempting to obtain, money of plaintiff, under unscrupulous business methods, which fall

but little short of false pretense; for it is proper, in considering the effect of defendant's negotiating insurance on property, and receiving consideration therefor, to assume that defendant's managers and agents knew that mortgages, both of real and personal property, are lawful, and that not a few exist, as shown by the public records, and further that they are fully acquainted with the conditions of the policy proposed to be issued. . . . The situation further involves the misleading of the one pretended to be insured into the belief that the property in question was insured, when in fact it was not, and thus not only so contriving as to get pay for the risk without assuming it, but doing the more grievous wrong of leading the party honestly seeking and paying for insurance into suffering the entire loss of the things proposed to be insured in the transaction. . . . We hold that under the state of facts shown, defendant by writing the insurance on said merchandise without inquiry as to the mortgage thereon did consent to take the risk on the goods under mortgage as effectually as if consent had been indorsed on the policy.'

"In *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624 [39 N. E. 534], it is held by the appellate court of Indiana that 'where application for insurance is orally made, and there are no questions asked concerning encumbrances and the insured is unaware that the existence of a mortgage was fatal to his insurance, the insurer will be deemed to have waived a provision for forfeiture by reason of existing encumbrances. Relying upon appellant's failure to make any inquiry, appellee depends upon the policy as an indemnity in case of loss, but when the loss comes discovers that he had no insurance. If the law requires such a holding, then our province is but to

declare it. The law, however, does not demand so inexorable adherence to the letter of the contract under all circumstances and all conditions. In quite a number of cases it has been adjudged that the failure of the company to inquire about, or call any attention to, some particular fact, operates to relieve the insured from a forfeiture which would follow his omission to disclose it, under the strict wording of his policy, although the fact was one material to the risk, but not one unusual or extraordinary,' and it is furthermore declared that in determining whether such a harsh and inequitable forfeiture clause is to be deemed waived the courts have generally applied the same liberal rule in favor of the assured as governs in the construction of the contract itself.

"In *Philadelphia Tool Co. v. British-American Assur. Co.*, 132 Pa. 236 [19 Am. St. Rep. 596, 19 Atl. 77], the supreme court of Pennsylvania treated the similar question of waiver of 'the sole and unconditional ownership clause' and it said: 'The defense now taken is that the policy is partly upon real estate and partly on personal property, for which an entire premium was paid, and that as the assured had no title to the land the policy is void as to it, and being void in part is void in whole, so that no money can now be had. This position rests on one of the almost innumerable conditions, stipulations and provisos which appear on the policy and which asserts that "if the assured is not the sole and unconditional owner of the property, or if the building stood on ground not owned in fee simple by the assured, or if the interest of the assured is not truly stated in the policy" then the policy shall be void. Is this condition applicable to the case presented on this policy? A policy of insurance, like any other contract, is to be read in the light of the circumstances that sur-

round it. This policy was issued without any application or written request describing the interest of the assured in the building. No actual representation of any sort upon the subject, oral or written, is alleged to have been made by or on behalf of the assured. We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer and intended to cover in good faith the interest which the insured had in the buildings. . . . We must also remember that this policy is to be interpreted most strongly against the company whose contract it is. Applying these principles to the question now raised, we conclude that the policy written on within the knowledge of the insurer was made in view of the facts of the case, and was intended to cover such interest in the buildings as the insured had.' It is clear that the waiver of 'the sole and unconditional ownership clause' there involved a wider departure from the letter of the policy than that of the chattel mortgage clause involves under the circumstances disclosed here in view of the fact that nothing was overdue and the property insured was of greater value than the aggregate of the fact of the policy and the sum secured by the mortgage. In line with the foregoing are decisions of the courts of Indiana, Kentucky, Montana, Nebraska, Oregon, Vermont, Virginia and Washington."

In brief, the argument of the *Raulet* case is that the rule that parties know the terms of written contracts should not be strictly applied to insurance contracts that contain numerous technical provisions, which, as a matter of common knowledge, the insured seldom knows or if he knows would not understand; that people trust the insurer's agent to protect them, and hence, there is a duty

upon the insurer to inquire and call attention specifically to such provisions or ask for written applications concerning the matters covered by such clauses; that chattel mortgages are common as the insurer well knows, and that the conduct of the insurer misleads the insured into the belief that he has protection and operates as a contrivance to get paid for a risk without assuming it. This proposition and the exact language of the *Raulet* case have been cited and applied with approval ever since the case was originally handed down.

For example, in *Kavanaugh v. Franklin Fire Insurance Co.*, 185 Cal. 307, 314, decided after the adoption of the statutory fire insurance policy, the California Supreme Court, speaking through Justice Wilbur, said:

“While it is true that an insurance policy is a contract, it is recognized that in the decisions bearing upon the responsibility of the insurance company, the policy has been treated more as a commodity than as a contract and rules have been evolved which are not applicable to ordinary contracts. It is therefore considered that when an insurance company without any inquiry as to the character of the ownership of the insured issues a policy and receives a premium therefor, it is just to assume that the insurance company intended to cover whatever interest the insured had in the property and that the insured by accepting a policy and paying the premium had the same understanding as to the legal effect of the policy. This conclusion is based somewhat upon the fact that insurance policies are usually very lengthy and contain a great many conditions in language which is somewhat obscure to the layman, and that the insurance company, having the power to write its policy in any form and in any language it chooses, should be

deemed to have adopted language which would fulfill the mutual intent of the parties, or if not, should be estopped from claim that its policy was void *ab initio*."

Other jurisdictions have long recognized that the mere obtaining of an insurance policy on property does not amount to a representation that the property is not encumbered, where no inquiry or voluntary statement is made concerning encumbrances.

Niagara F. Ins. Co. v. Layne, 162 Ky. 665, 172 S. W. 1090;

O'Brien v. Ohio Ins. Co., 52 Mich. 131, 17 N. W. 726;

Koshland v. Hartford Ins. Co., 31 Ore. 402.

As the Missouri court said in *Morrison v. Tennessee M. and F. Ins. Co.* (1853), 18 Mo. 262, 59 Am. Dec. 299:

"Insurance companies may protect themselves by inquiries in relation to these things and after filling their policies with so much detail and such minutiae of information in regard to other matters as to create the impression they are satisfied, to hold that they are not bound by their contracts, unless information of another kind is communicated by the assured, which is not sought for, would be enabling them to commit the rankest injustice."

It is settled in California that only a positive concealment of the facts as to ownership is a defense, and that where no inquiry has been made by the insurer it is assumed to have insured whatever interest the assured had

in the property when the application for insurance was made.

Dunne v. Phoenix Ins. Co. of Hartford, Conn.,
113 Cal. App. 256;

Kahn v. Commercial Union Fire Ins. Co., 16 Cal.
App. (2d) 42;

Bass v. Farmers' Mutual Protective Fire Ins. Co.,
21 Cal. App. (2d) 26.

The logic of the cases heretofore cited applies without qualification to the case at bar. No inquiry was made nor was a written application demanded of Mrs. Gawecki. She acted in complete good faith, concealing nothing from the agents of the insurer. Miss O'Rourke, acting as the agent of one appellee, was fully aware of all the encumbrances on the property insured. When she made the arrangements for the Dubuque Fire and Marine Insurance policy to be reissued in the name of Mrs. Gawecki, Meyer Pransky, agent of the Dubuque, had access to the escrow containing this information. When that same insurance company is asked to cancel a policy of fire insurance on a given piece of property and reissue that policy on the same piece of property but in the name of another person, it is put on notice that the property has been transferred. If it chooses to insure that property without any inquiry regarding the ownership of the property, it must be deemed to have insured whatever interest the new owner has in the property and to have waived any provisions in the policy inconsistent with such a conclusion.

The same reasoning applies to the General Insurance Company. It could have ascertained the nature of Mrs. Gawecki's interest in the property insured, but it deemed such information wholly unimportant. Indeed, the General Insurance Company covered the property at the re-

quest of the Republic Insurance Company without any regard whatsoever to the nature of the risk it undertook to carry, and after a loss had been sustained this company for the first time was heard to make rumblings about "sole and unconditional ownership" and "chattel mortgages."

In short, the position of the appellees is this: We shall write insurance through soliciting agents, who have no power to waive any of the provisions of the policy. We shall not request any information from either the applicant or our agent so that no matter how much the latter might know about the risk to be covered, we cannot be held bound by such knowledge; our policies contain numerous technical conditions, all of which may be used by us by way of defense in the event that the risk we assumed works to our disadvantage, but by not making any inquiry regarding these conditions our position will be inviolate in the event that a claim is filed with us.

Such a situation is a trap for the innocent applicant who deals with his insurance agent in complete good faith. Fortunately, such is not the law of California. Indeed, in this state, even where the insurance company does make an inquiry of the applicant, it has to assume liability in the event that its agent incorrectly furnishes it with the information given by the applicant. For example, in *Bass v. Farmers' Mutual Protective Fire Ins. Co.*, 21 Cal. (2d) 26, the plaintiff was the owner of the fee to one-half of the property insured, but he owned only a life estate in the other one-half. He told this to the insurer's agent, who, however, advised the company that the applicant owned the whole fee. In holding the company liable, the court said:

"In Cooley's briefs on the Law of Insurance, volume 3, page 2594, it is said: 'From an examina-

tion of the cases, the following propositions may be regarded as established by the weight of authority: Where the insured in good faith makes truthful answers to the questions contained in the application, but his answers, owing to fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The act of the agent whether he is a general agent with power to issue the policies, a soliciting agent or merely medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, though it is so stipulated in the application or policy.’ ”

Thus, even where the insurer makes appropriate inquiries, the only obligation imposed upon the applicant is to answer truthfully the questions submitted by the soliciting agent. Whether the court regards the company as bound by the knowledge thus gleaned by the soliciting agent, or whether it simply decides that, having done all in good faith that was requested of him, the applicant has a right to assume that his interest in the property is insured, the result is the same: The insurer is held liable in the event of loss, even though certain conditions of the policy may have been violated from the outset. It is manifestly unjust to hold that the insurer's position is enhanced and that it can avoid liability if it makes no inquiries at all as to the applicant's title. The law applicable to the case at bar was tersely stated in *Sam Wong v. Stuyvesant Insurance Company*, 100 Cal. App. 109, 12, in the following language:

“Moreover defendant is in no position to set up as a defense lack of ownership or that the insured did not own the ground on which the building was

situate, as it waived objection to the form of the policy and is estopped from denying liability thereunder by issuing the policy and accepting the premiums therefor without any written application having been made by the insured, and also without any discussion having been had relative to either title to the property on which the same was situate. Plaintiff herein, as owner, had an insurable interest in the building, he being in and operating the same as a dryer. (14 Cal. Jur. 465; 14 R. C. L. 915.) Prior to the adoption of the standard form of policy in this state, it was held that where the assured had an insurable interest in the property, and without fraud, in good faith applied for insurance upon the same, and made no actual misrepresentation or concealment of his interest therein, and the insurance company made no inquiry concerning his interest, and issued a policy to him, and accepted and retained the premium, the company must have been presumed to have knowledge of the condition of the title, and to have assured the property with such knowledge. (*Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 213, 107 Pacific 292; 14 R. C. L., pp. 926-932.) After the adoption of the standard form of policy, the law of waiver and estoppel remained the same as before upon this subject. (*Kavanaugh v. Franklin Fire Ins. Co.*, 185 Cal. 307, 315, 197 Pac. 99; 14 R. C. L., p. 932.)"

Accord:

Ames v. Employers' Casualty Co., 16 Cal. App. App. (2d) 255;

Hutchings v. Southwestern Automobile Ins. Co., 96 Cal. App. 318.

An application of the law of the State of California compels a reversal of the decision of the District Court.

Insurance Contracts Should Be Construed to Protect the Interests of the Assured Wherever Possible.

The philosophy which underlies these various decisions, which apparently does violence to the law of contracts, is based upon a frank recognition of the manner in which the insured and the insurer generally meet. There is no "meeting of the minds" characteristic of the ordinary contract, and the countless conditions contained in such a policy are drafted for the benefit of the insurer, not the insured. Nevertheless, the purpose of insurance, in particular fire insurance, is quite simple: The applicant wants to be reimbursed if his property is destroyed by fire and is willing to pay a substantial premium for this protection. All jurisdictions in this country, including California, endeavor, whenever possible, to fulfill the aims of insurance, as it is understood by men in the market place. In particular, the courts abhor technical forfeitures, which have the effect of placing the insurance company in the position of having received a substantial premium for having assumed no risk. This idea was embodied in the decision of *Glickman v. New York Life Ins. Co.*, 16 Cal. (2d) 631, 634:

"Contracts of insurance should be viewed in the light of their general objects and purposes, including the legitimate conditions prescribed by the insurer. (*Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 213.) In general, the object and purpose of insurance is to indemnify the insured in case of loss, and ordinarily such indemnity should be effectuated rather than defeated. To that end, the law makes every rational

intendment in order to give full protection to the interests of the insured. (1 Couch, Cyc. of Insurance Law, p. 402 *et seq.*) Policies of insurance create reciprocal rights and obligations, and the relationship created between the contracting parties should be characterized by the exercise of mutual good faith. (1 Couch, Cyc. of Ins. Law, p. 408; see also, *McElroy v. British America Assurance Co.*, 94 Fed. 990, 1000 [36 C. C. A. 615].) An insured is entitled to the protection which he buys and for which he pays substantial premiums. (*Wade v. Mutual Ben. Health and Accident Assn.*, 115 W. Va. 694, 177 S. E. 611, 614.)”

Stated differently, the rule is:

When claims are honestly made, care should be taken to prevent technical forfeitures such as would ensue from an unreasonable rule of enforcement unrelated to the merits.

Grant v. Sun Indemnity Co., 11 Cal. (2d) 438;

Glickman v. New York Life Ins. Co., 16 Cal. (2d) 626;

13 Appleman, Insurance Law and Practice (1943),
Sec. 7385, p. 37.

See

New York Life Ins. Co. v. Eggleston, 96 U. S. 572, 577;

Kansas City Life Ins. Co. v. Davis (C. C. A. 9),
95 F. (2d) 952, 957;

American Credit Indemnity Company v. N. K. Mitchell & Co. (C. C. C. A. 3), 78 F. (2d) 276, 277-278;

Langmaid, *Waiver and Estoppel in Insurance Law*, 20 Cal. L. Rev. 1, 40-41;

7 Univ. of Pitt. L. Rev. 148-150.

It is therefore the general rule that the condition alleged to have been breached must be material to the risk undertaken by the insurer before a policy of insurance will be voided. As was stated in *Goorberg v. Western Assurance Company*, 150 Cal. 510:

“Where the warranty or condition which is broken does not affect the risk on certain items, the insurance should not be held to be ineffective as to those items. Such construction would subject the insured to a forfeiture for a cause which has no substantial relation to the interest of the insurer. The purpose of the warranties and conditions is to protect the insurer from liability on risks which he would have been unwilling to take for the stipulated premium, or, perhaps for any premium. And if, as to any item, the breach of condition or warranty does not at all affect the risk, the release of the insurer from liability from that item may fairly be said not to have been within the reason for the condition or warranty and hence not within the contemplation of the parties. . . . ‘In other words, it is in their relation to the moral hazard that the materiality of statements as to title or interest rests.’ 2 Cooley, Briefs on Ins. 1340.”

In 1830, in *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507, in discussing the effect of the failure of an insurer to disclose the existence of a mortgage on the property sought to be insured, in answer to the contention that a fair and full representation of interest was not made, the court said:

“We do not perceive how the encumbrances on the plaintiff's property could be considered as material to the risk. The destruction of the house did not extinguish the mortgage debts, so that he was interested to the amount of the value of the property insured. It was not necessary to specify in the policy that the property was under mortgage. We are therefore of the opinion that here was a fair and full representation of every circumstance material to the risk.”

This language is of equal validity today. The existence of the chattel mortgages in question did not materially affect the risk assumed by the appellees. The appellants' interest in the property was such that they stood the entire loss by the destruction of the property. (See Cooley's *Briefs on the Law of Insurance* 1369.) Furthermore, this court can take judicial notice of the fact that nowadays, as a matter of routine, fire insurance companies waive the provisions of the chattel mortgage clause by an endorsement attached to the policy. This being so, the appellants fail to see any substance in the contention of the appellees that the chattel mortgage clause was material to the risk.

The Cases Relied on by the District Court in Reaching Its Decision May Be Distinguished From the Case at Bar on the Ground That in the Former the Insured Did Something After the Policy Had Been Issued, Which Changed the Risk Which the Insurer Had Accepted.

In reaching his decision, Judge Yankwich regretfully took the position that he was powerless to aid the appellants because of the authority of the case of *Hargett v. Gulf Ins. Co.*, 12 Cal. App. (2d) 449. In that case there were no encumbrances on the property when the policy was issued. However, some time *after* the policy had been issued, the assured executed a chattel mortgage on the insured property. Later, the property was destroyed by a fire. The court held that in giving this chattel mortgage, the plaintiff violated the provisions of the policy and could not recover for the loss in the absence of an endorsement to the effect that the insurer was willing to continue the policy in force. Three things are significant in this decision:

1. The leading case of *Raulet v. Northwestern etc. Ins. Co.*, *supra*, a comprehensive analysis of the law pertaining to the problem before the court, was not cited or referred to by the California District Court of Appeal.

2. Notwithstanding the fact that the decision in the *Hargett* case was inconsistent with the *Raulet* case, no petition for a rehearing in the District Court of Appeal was ever filed.)

3. The *Hargett* case, and the cases cited by the court in that decision, all involved factual situations where the insured breached the conditions of the policy *after* it had been issued.

Assuming for the sake of argument that the existence of a chattel mortgage on insured property materially affects the risk assumed by the insurance company—this assumption is implicit in the contention of the appellees—it is of fundamental importance to notice that, in the *Hargett* case, the insured did something *after* the policy had been issued, which materially affected the risk; whereas, in the case at bar and in the *Raulet* case, the risk assumed by the insurance company remained constant from the time the policy was issued until the fire. While the cases are thus distinguishable on their facts, they can be reconciled. The *Raulet* case, which is determinative of the case at bar, holds that where the insurer makes no inquiry as to the existence of any encumbrances on the insured property, it is deemed to have insured whatever interest the insured had *at the time the policy was issued* and to have waived any provisions in the policy inconsistent with that proposition. The *Hargett* case decides, quite sensibly, that the waiver concept of the *Raulet* case should not be extended to apply to a situation in which the insured does something *after* the policy has been issued which materially alters the risk originally insured.

The facts of *Steil v. Sun Ins. Office*, 171 Cal. 795, which was the principal authority cited in the *Hargett*

case and which was also relied upon by Judge Yankwich, is equally distinguishable from the *Raulet* case and the case in issue. In that case, the insurance company insured certain goods while they were in the Chronicle Building in San Francisco. Long after the policy had been issued, the insured moved the goods to another building, where they were destroyed by fire. Quite clearly, the insurance company might not have been willing to insure the goods in the other building without a substantial increase in the premium. That is to say, the actions of the insured substantially altered the risk, after the policy had been in force, and it would be unfair to hold that the insurance company was bound to insure this new and different risk on the same terms as before.

The distinction between the *Hargett* and *Steil* cases and the *Raulet* case and the case before this court is of decisive importance; yet it was overlooked by the trial court in rendering its decision.

Conclusion.

Judge Yankwich stated that he regretted "that there is no method of compensating the plaintiffs for the undisputed loss they sustained through the fire." [General's Tr. p. 16.] Certainly the law controlling the case, as outlined above, provides not only a method, but, indeed, compels the conclusion that the appellants must be compensated by the appellees in accordance with the contracts of insurance. However, what is of equal importance is that, even if there were no such conclusive authority to sustain the appellants' position, the philosophy of the

California courts is such that where the applicant deals openly and in good faith with the insurer, the latter is held to be under a similar obligation. In effect, the insurer will be held to have provided that precise protection which by its conduct it has led the insured to believe he has purchased. The case at bar is precisely such a case.

It is therefore respectfully submitted that the judgments in favor of the Dubuque Fire and Marine Insurance Company of Dubuque, Iowa, and the General Insurance Company of America should be reversed, with instructions to enter judgment in favor of the plaintiffs.

Respectfully submitted,

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Attorneys for Appellants.

Nos. 11775 and 11776

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11775.

LAURA GAWECKI and COLLETTE MITRE, doing business under the
fictitious name of SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
Appellee.

No. 11776.

LAURA GAWECKI and COLLETTE MITRE, doing business under the
fictitious name of SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

DUBUQUE FIRE AND MARINE INSURANCE COMPANY OF
DUBUQUE, IOWA, a corporation,

Appellee.

Brief of Appellees, General Insurance Company of
America and Dubuque Fire and Marine Insurance
Company of Dubuque, Iowa.

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TOPICAL INDEX

PAGE

Appellees' statement of the case.....	1
Appellees' argument	5
Appellees' answer to appellants' argument and cases.....	9
Cases cited by appellants.....	24
Trial court did not err in denying appellants' motions for new trial and to amend findings, conclusions and judgment.....	28

TABLE OF AUTHORITIES CITED

CASES	PAGE
Alexander v. General Ins. Co. of America, 22 Fed. Supp. 157....	8
Allen v. Home Ins. Co., 133 Cal. 29.....	8, 10
Ames v. Employers' Cas. Co., 16 Cal. App. (2d) 255.....	27
Arnold v. American Ins. Co., 148 Cal. 660.....	8, 10
Bass v. Farmers' Mutual Protective Fire Ins. Co., 21 Cal. App. (2d) 26	26
Boston Ins. Co. v. Hudson, 11 F. (2d) 961.....	21
Cinema Schools v. Federal Union Ins. Co., 1 Fed. Supp. 42.....	7, 16, 19
Cinema Schools v. Westchester Fire Ins. Co., 1 Fed. Supp. 37....	7, 16, 19, 24
Conner v. Union Automobile Ins. Co., 122 Cal. App. 105.....	8
Dunne v. Phoenix Ins. Co. of Hartford, Conn., 113 Cal. App. 256	26
Enos v. Sun Ins. Co., 67 Cal. 621.....	22
Farnun v. Phoenix Ins. Co., 83 Cal. 246.....	22
Fidelity Co. v. Fresno Flume Co., 161 Cal. 466.....	22
Fidelity Union Fire Ins. Co. v. Kelleher, 13 F. (2d) 745.....	21
Fischer v. London & L. Fire Ins. Co., 83 Fed. 807.....	21
Hargett v. Gulf Ins. Co., 12 Cal. App. (2d) 449, 55 P. (2d) 1258.....	7, 10, 14, 15, 16, 22, 24, 26
Harlow v. American Equitable Assur. Co., 87 Cal. App. 28.....	7
Hartford Fire Ins. Co. v. Nance, 12 F. (2d) 575.....	21
Home Ins. Co. v. Scott, 284 U. S. 177, 76 L. Ed. 230.....	7, 21
Imperial Fire Ins. Co. of London, England, v. County of Coos, 151 U. S. 462, 38 L. Ed. 231.....	23
Iverson v. Met. Life Ins. Co., 151 Cal. 746.....	22
Kahn v. Commercial Union Fire Ins. Co., 16 Cal. App. (2d) 42	26
Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307.....	7, 25

PAGE

Kurihara v. Detroit Fire Ins. Co., 79 Cal. App. 257.....	7
Maryland Cas. Co. v. Eddy, 239 Fed. 477.....	22
McCoy v. Relief Assn., 66 N. W. 699.....	19
Missouri Pacific Railway Co. v. Western Assur., 129 Fed. 610....	22
Mulrooney v. Royal Ins. Co., 163 Fed. 833.....	22
National Reserve Ins. Co. v. Ord, et al., 123 F. (2d) 73.....	8, 10
Northern Assur. Co. v. Grandview Building Assn., 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213.....	21, 22
Northwestern Nat. Ins. Co. v. McFarland, 50 F. (2d) 539.....	21
Penman v. St. Paul F. & M. Ins. Co., 216 U. S. 311, 54 L. Ed. 493	21
Raulet v. Northwestern Nat. Ins. Co., 157 Cal. 213.....	24
Sam Wong v. Stuyvesant Ins. Co., 100 Cal. App. 109.....	27
Scottish Union v. Encampment Smelting Co., 166 Fed. 231.....	21
Shuggart v. Lycoming Fire Ins. Co., 55 Cal. 408.....	22
Slade Lbr. Co. v. National Surety Co., 128 Cal. App. 420, 17 P. (2d) 775.....	22
Steil v. Sun Insurance Office, 171 Cal. 795, 155 Pac. 72....	10, 14, 15
United States v. Bransen, 114 F. (2d) 232.....	28
Valentine v. Head Camp, P. J., W. O. W., 180 Cal. 192.....	22
Wilson v. Maryland Cas. Co., 19 Cal. App. (2d) 463, 65 P. (2d) 903	22

STATUTES

Insurance Code, Secs. 2070-2071	2, 3, 6
Insurance Code, Sec. 2072.....	4

Nos. 11775 and 11776

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Appellants,

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GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Appellee.

No. 11776.

LAURA GAWECKI and COLLETTE MITRE, doing business under the
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DUBUQUE FIRE AND MARINE INSURANCE COMPANY OF
DUBUQUE, IOWA, a corporation,

Appellee.

Brief of Appellees, General Insurance Company of
America and Dubuque Fire and Marine Insurance
Company of Dubuque, Iowa.

Appellees' Statement of the Case.

Appellants, as plaintiffs, brought two separate actions, one against appellee, General Insurance Company of America, and one against appellee, Dubuque Fire & Marine Insurance Company of Dubuque, Iowa. These causes were consolidated for trial and appeal, and since appellants

have consolidated their brief, appellees are joining in answer to appellants' brief.

Appellants brought action against each appellee under separate complaints, but since, except for minor variations which will hereafter be noted, the insurance contracts were substantially the same, and the issues raised practically identical, and there was no substantial difference in the Findings of Fact made by the Court in each case, appellees believe that one statement of appellees' position will cover argument on both appeals.

Appellants brought the separate causes of action by complaints against the separate appellees to enforce the terms of two separate policies of insurance executed and delivered severally by the appellees. Each and both of the contracts of insurance were in the statutory form provided by the laws of the State of California. [Insurance Code, Secs. 2070-2071; General Tr. 3, Dubuque Tr. 3; Pltf. Exs. 1-2.]

The General Insurance Company policy insured appellant, Laura Gawecki, doing business as the Skylark Cafe, from June 28, 1945, to June 28, 1948, against loss by fire to the furniture and fixtures situate at 7519 Sunset Boulevard, Los Angeles, California; and the Dubuque Fire & Marine Insurance Company policy insured Laura Gawecki and Collette Mitre, doing business as Skylark Cafe, from July 9, 1945, to July 9, 1948, against loss by fire to the same property.

The General Insurance Company policy was executed by Thomas V. Humphreys, General Agent of said com-

pany; and the Dubuque Fire & Marine Insurance Company policy was executed by S. Fine, Agent for said company. [Pltf. Exs. 1-2.]

Each and both of said policies contained the provisions made mandatory by the above-cited statutory provisions (Insurance Code, Secs. 2070-2071), as follows:

“Chattel mortgage. Unless otherwise provided by agreement in writing endorsed hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage. * * *

“Unless otherwise provided by agreement endorsed hereon or added hereto this entire policy shall be void, * * * if the interest of the insured be other than unconditional and sole ownership, * * *.

“This policy is made and accepted subject to the foregoing stipulations and conditions and those hereinafter stated, which are hereby specially referred to, and made part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provisions or condition of this policy except by writing endorsed hereon or added hereto, and no person, unless duly authorized in writing, shall be deemed the agent of this company.” [Pltf. Exs. 1-2.]

They also complied with the statute (Sec. 2072, Insurance Code), as follows:

“There shall be printed on the outside of the policy, in type not smaller than small pica, the following words in this form:

“READ THIS POLICY.

“* * * POLICY IS SUSPENDED, unless otherwise agreed in writing, if * * *

“9th. Property is or becomes encumbered by chattel mortgage; * * *.” [Pltf. Exs. 1-2.]

There were no agreements, either in writing or otherwise, endorsed upon the policy or added thereto, waiving or changing these provisions, and no agreements, either oral or in writing, for any other or different contracts than the written contracts of insurance. [General Tr. 26, f. 6, 28; Dubuque Tr. 27, f. 34.]

A fire occurred on the 12th day of January, 1946, damaging the property described in the two contracts of insurance. (No issue is made upon the amount of loss or damage, and it will not be further noted.)

At the time of the fire, all of the property damaged was encumbered by chattel mortgages. [General Tr. 26, f. 28; Dubuque Tr. 26, f. 33.]

These chattel mortgages were executed July 7, 1945, and recorded August 22, 1945. [General Tr. 64, f. 29.]

Neither of the appellees, nor any of their officers or agents, had any notice or knowledge of these chattel mortgages until after the fire. [General Tr. 26, f. 29; Dubuque Tr. 23, f. 31.]

Appellees' Argument.

Appellants, in their brief, adopt a novel approach to an appeal from the rulings of a trial court in a case at law. They make no specific assignments of error other than that the Court erred in denying appellants' motion for new trial and motions to amend Findings and Conclusions and to direct entry of new Judgment; and the general statement that the evidence was insufficient to sustain the Findings of Fact, Conclusions of Law, and Judgment. (App. Br. p. 5.)

Nowhere do appellants specify or point out wherein the trial court's Findings or any special portion thereof are not sustained by the evidence. They cannot do so, as each and every Finding was supported by either documentary evidence, admissions in the pleadings or in the course of trial, or by uncontradicted testimony. Since, therefore, appellants cannot, and have not, tried to point out any insufficiency of evidence to support the Findings, or any of them, appellees feel that they are neither called upon nor would this Court desire, an elaborate review of the evidence to demonstrate wherein each Finding is sustained by the evidence, and will accordingly present their argument from the standpoint of demonstrating that the Findings unquestionably support the Conclusions of Law and Judgment.

Reduced to the simplest terms, these appeals present nothing but the following proposition:

Appellee, General Insurance Company of America, executed and delivered to appellant, Laura Gawecki, doing business as Skylark Cafe, and appellee, Dubuque Fire and Marine Insurance Company, executed and delivered to Laura Gawecki and Collette Mitre, doing business as

Skylark Cafe, their separate policies of insurance insuring the parties named against loss by fire to certain personal property. Each and both of the policies were in the form made mandatory by the statutes.

The property described was damaged by fire on the 12th day of January, 1946, and at the time of the fire all of the property damaged was encumbered by chattel mortgages. (Appellants make some contention that one of the chattel mortgages, although in form and substance a chattel mortgage, was not a real chattel mortgage, but since appellants concede that the other mortgage was a valid chattel mortgage (Pltf. Br. p. 9), we believe no further attention need be paid to this contention.)

Neither of the appellees, nor their agents, had any notice or knowledge of these chattel mortgages until long after the fire, and neither of the appellees, either orally or in writing, or by any acts constituting waiver or estoppel, waived, modified, or in any manner changed the written contracts of insurance sued upon.

It should follow without saying that if the terms of written contracts, plain and unambiguous and not against public policy, are to be enforced when suit is brought upon the contracts, then the clear statutory provisions of the contracts in question providing that the "company shall not be liable for loss or damage to property insured hereunder while encumbered by chattel mortgage," must be given effect, and the trial court did not err in doing so.

That the provision is not against public policy, of course, is manifest by the fact that it is a mandatory statutory provision and insurance companies are prohibited from executing and delivering a policy that does not contain this provision (Insurance Code, Secs. 2070-2071),

and the parties to an insurance contract in this state must be deemed to have entered into the contract with reference to the statutory form.

Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307;

Harlow v. American Equitable Assur. Co., 87 Cal. App. 28;

Kurihara v. Detroit Fire Ins. Co., 79 Cal. App. 257.

The clause is clear and unambiguous and the insurance is suspended while the property is encumbered by a chattel mortgage. The last case on the subject in the California state courts was *Hargett v. Gulf Ins. Co.*, 12 Cal. App. (2d) 449, 55 P. (2d) 1258.

See also the opinions by Judge Knox, sitting in District Court, Southern District of California:

Cinema Schools v. Westchester Fire Ins. Co., 1 Fed Supp. 37;

Cinema Schools v. Federal Union Ins. Co., 1 Fed. Supp. 42.

These three cases were all tried and decided after the adoption of the California Standard Policy containing the chattel mortgage clause under discussion.

See also, United States Supreme Court decision applying the chattel mortgage provision contained in the New York standard form:

Home Ins. Co. v. Scott, 284 U. S. 177, 76 L. Ed. 230.

For applying analogous clauses in the policy, see the recent decision in this Court opinion by Circuit Judge Denman, holding there could be no recovery under the policy while the property was occupied for purposes other than stipulated in the contract:

National Reserve Ins. Co. v. Ord, et al., 123 F. (2d) 73.

See also the following cases cited therein:

Arnold v. American Ins. Co., 148 Cal. 660;

Allen v. Home Ins. Co., 133 Cal. 29.

See also opinion of the late Judge Jenney, Southern District of California, holding that the provision insuring personal property only while located at a particular place prevented recovery when the property was at another location:

Alexander v. General Ins. Co. of America, 22 Fed. Supp. 157.

See also:

Conner v. Union Automobile Ins. Co., 122 Cal. App. 105,

which holds that the insurance was suspended while an automobile was being used to draw a trailer contrary to the stipulations of the contract.

Answer to Appellants' Argument and Cases.

Appellants in their argument present several false premises, none of which are sustained by the issues and facts or sound in law. Appellees are therefore obliged to burden this Court with answers to propositions raised that are neither within the issues nor sound in law.

The first contention raised by appellants is that the existence of a chattel mortgage on the property does not void the policy under the chattel mortgage clause where there was no inquiry made. And from this false premise and by the use of sundry isolated bits of dicta and the citations from cases treating on entirely unrelated matters, appellants endeavor to demonstrate that the standard chattel mortgage clause does not mean what it says—that “this company *shall not* be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage,” but means, on the contrary, that “this company *shall* be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage.”

The trial court did not find or hold, and there was never any contention made that the chattel mortgages voided the policies. The contracts and the statutory provisions do not so provide, but provide that the company shall not be liable for loss to any of the property while encumbered by chattel mortgage, but the “liability of the company upon other property insured shall not be affected by such chattel mortgage.”

This provision is a specification of the property insured and must be treated the same as the similar provisions in

the contract, such as the provision providing the policy insured only while the property was occupied for dwelling house purposes.

Allen v. Home Ins. Co. and

Arnold v. American Ins. Co., cited *supra*.

Or the provision that the property was insured only while occupied for a certain purpose, as shown by the case of *National Reserve Ins. Co. v. Ord, et al.*, cited *supra*.

Or that the property was insured only while at a certain location, as demonstrated in the leading case of *Steil v. Sun Insurance Office*, 171 Cal. 795, 155 Pac. 72.

These cases, in addition to the cases heretofore cited relating to the chattel mortgage clause, all point out that such conditions are not warranties or conditions providing for the voidance of the contract in case of their breach, but are provisions going to the basis of the contract and specifying the property against loss of which the policies insure, and, consequently, for a court to disregard them would be for the court to enforce a contract that was not made.

The case of *Hargett v. Gulf Ins. Co.*, 12 Cal. App. (2d) 449, 55 P. (2d) 1258, is the last and only case interpreting the chattel mortgage provision decided in the California courts since the adoption of the standard policy containing the chattel mortgage clause under discussion. This case answers every contention raised by appellants. It is the latest decision and expression of a California court on the interpretation of the chattel mortgage provision, in fact, the only case in California where the interpretation and application of the chattel mortgage provision has been directly involved since the adoption of the standard policy.

In that case, one E. H. Rose was an agent for the defendant companies. The assured notified Rose that he had given a chattel mortgage on the property insured and would take the policies to the mortgagee bank. Nothing further was said about the policies. No request was made by the assured that any endorsement should be made thereon and Rose said nothing whatever on the subject. Rose did not report the matter to any of the companies or to any of the representatives thereof. Within two or three days after the conversation with Rose, plaintiff took the policies to the bank where they remained until after the fire, which occurred about a month later. The trial court found that the companies had waived the chattel mortgage provision of the policy, but the Appellate Court, in reversing the case, found to the contrary upon this evidence, and after deciding that Rose as a local agent was without power to consent to the chattel mortgage and thereby continue the insurance in force notwithstanding the mortgage, said:

“(3) Even though it had been established that Rose was a general agent, the evidence would still be insufficient to show that the companies waived compliance with the conditions of the policies. By the terms of the policies no officer or agent had authority to waive any provision or condition of the policies except by writing endorsed thereon or attached thereto. These provisions may not be ignored. They are valid and must be given effect the same as any other provisions. (*Fidelity & Casualty Co. v. Fresno Flume etc. Co.*, 161 Cal. 466 [119 Pac. 646, 37 L. R. A. (N. S.) 322]; *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68 [58 Pac. 92, 61 Pac. 667]; *Iverson v. Metropolitan Life Co.*, 151 Cal. 746 [91 Pac. 609, 13 L. R. A. (N. S.) 866]; *Madsen v.*

Maryland Casualty Co., supra.) (4) The rule relied upon by plaintiff and supported by the great weight of authority is, that after a breach has occurred which would avoid or forfeit a policy, unless consented to by the company and a proper officer has knowledge thereof and with such knowledge the company leads the assured to rely upon his policy as a valid policy, it will not be heard to allege such breach against a claim for subsequent loss occurring at a time when, from the conduct of the company, the assured had every right to believe that his property was protected by the policy. (*Arnold v. American Ins. Co.*, 148 Cal. 660 [84 Pac. 182, 25 L. R. A. (N. S.) 6]; *West Coast Lumber Co. v. State Inv. & Ins. Co.*, 98 Cal. 502 [33 Pac. 258]; *Murray v. Home Benefit Life Assn.*, 90 Cal. 402 [27 Pac. 309, 25 Am. St. Rep. 133]; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422; *Farrar v. Policy Holders Life Ins. Assn.*, 3 Cal. App. (2d) 87 [39 Pac. 2d 229].) The principle of these cases is that the breach terminates the liability of the insurance company and creates an obligation to return to the insured the unearned portion of the premium which the company has not the right to retain, thus imposing upon the company having knowledge of the breach a positive duty to elect between cancellation of the policy and waiver of the breach. If the company remains silent and fails to cancel or rescind the policy and the assured is actually misled thereby into believing that his policy is valid and in force the company is estopped to rely upon the breach. The rule would be applicable here if the breach had been one which avoided or forfeited the policies. Such, however, is not the case.

“(5) Upon the giving of the chattel mortgage the policies did not become void nor were they forfeited. There was a mere suspension of insurance coverage

as to such of the insured property as was encumbered by the chattel mortgage and while it was so encumbered. This suspension was temporary and the coverage would have been restored upon satisfaction of the debt or release of the property from the lien and it would have been restored as to any portion of the property that might have been released from the lien. The policy itself remained in force. There was no obligation on the part of the companies to return any of the premiums; in fact, the policies provided that suspension of insurance would not entitle the assured to the return of any part of the premiums, nor were the companies under the duty of giving notice to the assured that the insurance had been suspended. He must be presumed to have known that. The circumstances were not such as to call upon the companies or any agent of the companies to take any action whatever of their own, nor were they under the duty to suggest to plaintiff any action which he should take in the premises. The essential elements of estoppel are entirely wanting. In remaining silent and retaining the premiums paid, the companies did not fail in any duty they owed the assured under the contracts or otherwise.

“The facts of this case bring it directly within the holding of the Supreme Court in *Steil v. Sun Ins. Office*, 171 Cal. 795 [155 Pac. 72]. In that case goods were insured while contained in the Chronicle Building and not elsewhere. Some of them were removed to another building, thus suspending the insurance as to the removed portion, without annulling the policy. It was said as to this situation: ‘There being no condition or covenant against removal, the result would be that while such removal would, for the time being, terminate the risk incurred by the company, it would not avoid the policy. If the goods were subsequently returned, the company would be

liable, as before, for a loss occurring to them while in the building. In order to continue the insurance upon the goods, or, in other words, to carry it to the goods in the new location, something more was required than a mere notification by the assured to the insurer of the fact that the goods were, or were about to be, removed. That fact alone would only suspend the insurance risk. The insurer must be informed, or be given good cause to believe, that the party insured desired to have the insurance on the goods continued in the new place, that he wished a modification of the policy to make it cover the goods in the new location, and must then, by positive act, or by failure to act, cause the insured to believe that the insurer consented to such transfer or modification, and that the goods were covered by the policy. Something in the nature of a new agreement, either express, or implied from conduct or words, or created by estoppel, was necessary.'

"No distinction may be drawn between temporary suspension of insurance by reason of the removal of the assured goods, and a temporary suspension by reason of the encumbrance of the property by chattel mortgage. In neither case is the policy terminated or avoided. If the plaintiff had desired to have the insurance continue, notwithstanding the chattel mortgage, it was his duty to notify the companies of the mortgage, to request the endorsements of his policies, and to exact some assurance that endorsements would be made or that the insurance would be continued in force without them. The evidence fails to show that plaintiffs met any of these requirements."

The Court in the *Hargett* case quoted rather extensively from the case of *Steil v. Sun Ins. Office*, 171 Cal. 795. In that case the assured claimed to have notified the com-

panies of the removal of the goods from the location where they were insured and that none of the companies had objected to the removal or had given notice that the goods were not covered in the new place.

The Court in the *Steil* case, in addition to the language which is quoted in the *Hargett* case, said:

“As above stated, there is no provision in the policy that the removal of the goods should operate to annul it. The provision in the insurance clause that the goods were insured while contained in the Chronicle building, and not elsewhere, coupled with the qualified description, operated to relieve the company of further obligation upon the removal of the goods from said building with respect to the goods so removed. The qualification was a part of the description of the things insured. They were not merely *the goods*, but were the goods while contained in the Chronicle building. A loss of the goods by fire while they were out of the building would not be a loss covered by the policy, and the insured would not be liable therefor. (*Mawhinney v. Southern Ins. Co.*, 98 Cal. 184 [20 L. R. A. 87, 32 Pac. 945]; *Benicia A. Works v. Germania Ins. Co.*, 97 Cal. 468 [32 Pac. 512]; *Slinkard v. Manchester etc. Co.*, 122 Cal. 595 [55 Pac. 417].) This language of the insurance clause did not constitute a warranty, either express or implied, by Steil, that he would not remove the goods. The company had no occasion to demand of Steil a warranty against removal. Such removal would not increase its obligation but would relieve it therefrom. The insurance clause completely protected it against a loss occurring to the goods in any other place. The language does not imply a warranty. Its effect is merely that the goods were insured only while kept in the building designated.”

As previously stated, the *Hargett* case is the only California case decided involving the chattel mortgage provision of the policy since the adoption of the standard form of fire insurance policy. The only other cases in this jurisdiction are the two cases decided by Judge Knox sitting in the Southern District of California:

Cinema Schools v. Westchester Fire Ins. Co., 1 Fed. Supp. 37, and

Cinema Schools v. Federal Union Ins. Co., 1 Fed. Supp. 42.

In the first case cited, the Court, speaking of the chattel mortgage provision, said:

“(7) Provisions of a fire insurance policy such as that now before me are valid and enforceable, and may constitute a complete defense against liability on the part of the insurer. *Sun Insurance Office v. Scott*, 284 U. S. 177, 52 S. Ct. 72, 76 L. Ed. 229; *Hunt v. Springfield F. & M. Ins. Co.*, 196 U. S. 47, 25 S. Ct. 179, 49 L. Ed. 381. Indeed, a chattel mortgage, valid as between the parties thereto, although fraudulent and void as to creditors, is an incumbrance which may raise a good defense to an action brought on a fire insurance policy such as the instant suit. *Hartford Fire Ins. Co. v. Jones*, 31 Ariz. 8, 250 P. 248; *Home Ins. Co. v. Scott* (C. C. A.), 46 F. (2d) 10.”

Appellants (App. Br. p. 29) make the bald statement that the cases cited by the District Court may be distinguished on the ground that in those cases the insured did something after the policy had been issued which changed the risk which the assured had accepted. Appellants point out no reason why such a gratuitous statement should be sustained or cite any cases in support thereof.

Moreover, appellants again ignore the record and, of course, the reasoning given in all the cases heretofore cited.

As to the record, it shows conclusively that there were no facts or circumstances that would give rise to any possible waiver of the conditions of the contract or sustain an estoppel to rely thereon, and the Court so found.

To briefly recapitulate the facts relating thereto, we find first that the chattel mortgages were, in the case of the General policy, executed after, and not before, the policy was applied for and became effective. And as to the Dubuque, the negotiations for the insurance were prior to the execution of the chattel mortgages. The insurance transactions were handled for the appellants by one Mrs. O'Rourke, who was not an agent for either of the companies but was representing the appellants. Her relations with the insurance commenced sometime in May of 1945. [Tr. 58, f. 22.] Neither Mrs. O'Rourke nor the appellants had any direct negotiations with either of the appellees. [General Tr. 59, f. 23; Dubuque Tr. 14, f. 15-16.]

As to the General policy, they had no negotiations with the General at any time and neither Mrs. O'Rourke nor appellants ever talked with anybody from the General. Mrs. O'Rourke made application for this insurance to the Republic Insurance Company. For some reason that does not appear, the Republic Insurance Company did not enter into the contract, but procured the General Insurance Company policy through Thomas V. Humphreys & Co., General Agents for said company. [General Tr. 59, f. 23; Pltf. Ex. 1.]

The risk was bound some time in May of 1945. [General Tr. 59, f. 23.] The policy was delivered to Mrs.

O'Rourke by the representative of the Republic Insurance Company and insured appellants from the '28th day of June, 1945, to the 28th day of June, 1948. [General Tr. 60, f. 24.] The appellants did not even know that insurance was being procured in the General, and, in fact, had they known it was to be in the General, they would not have taken it. [General Tr. 60, f. 24.] However, appellants did accept the policy as tendered by the General and retained it and still retain it.

As to the Dubuque policy, practically the same situation exists. Appellants had no direct relationships with any officer or agent of the Dubuque authorized to consummate insurance contracts. Their only relationship was with one Pransky, who had verbal authority to solicit insurance and to place orders for acceptance or rejection. He had no authority to bind risks or countersign policies. [Dubuque Tr. 15, f. 15.] The Dubuque transactions were had at the same time as the General transactions, as above outlined, and eventuated in the submission to appellants of the Dubuque policy insuring from the 9th day of July, 1945, to the 9th day of July, 1948. [Pltf. Ex. 2.] This policy was also delivered to appellants and accepted in its present form and retained.

The situation, as disclosed by the evidence, is simply that each of these companies had submitted to appellants their separate policies of insurance, all the terms of which were embraced in the written instruments, and appellants accepted these policies with full knowledge of their statutory provisions, and are here seeking to enforce the terms of the contract, but refuse to be bound by the very terms of the policies they are suing upon.

Since, as demonstrated by the cases previously cited and quoted from, this case does not involve a question of war-

ranty, the breach of which would void the policy, which might be the subject of waiver or estoppel if the evidence warranted, but a case in which the appellants are seeking to recover for the loss of property not insured and to create a liability not stipulated for in the contract, which certainly could not be created by estoppel (*McCoy v. Relief Assn.*, 66 N. W. 699), particularly where there is not an iota of testimony to warrant it. Appellees fear that they are unduly burdening this brief by further citations and argument, but since the "straw man" is there, appellees have no alternative but to pray the Court's indulgence while they proceed further to knock it down.

That it is immaterial whether the property became encumbered by chattel mortgage before or after the policies became effective is amply demonstrated by the opinion of Judge Knox in the case of *Cinema Schools v. Federal Union Ins. Co.*, 1 Fed. Supp. 42, a companion case of *Cinema Schools v. Westchester Fire Ins. Co.*, heretofore cited, wherein Judge Knox disposes of this contention in the following language:

"This is a companion case to *Cinema Schools, Inc., v. Westchester Fire Ins. Co.* (D. C.), 1 F. Supp. 37. The facts involved in the two suits are identical, except that here the chattel mortgage discussed in the Westchester Fire Insurance Company opinion was in existence at the time the present defendant issued its policy of insurance. As a result, plaintiffs take the position that since no inquiry was made by defendant prior to the issuance of its policy, the stipulation against chattel mortgages was thereby waived. An examination of the adjudicated cases discloses this contention to be without substantial foundation. In *Boston Ins. Co. v. Hudson* (C. C. A.), 11 F. (2d) 961, action was brought on a California standard

form fire insurance policy, containing a provision, as in the case at bar, that the policy should be void, if the interest of the insured were other than unconditional and sole ownership. The insurer or its agent had notice, before loss, of breach of this condition. Nevertheless, the court held that there was no waiver of the breach because the policy provided that no representative of the insurer had power to waive any provision of the policy except by written indorsement. Similarly, in the case of *Fidelity Union Fire Ins. Co. v. Kelleher* (C. C. A.), 13 F. (2d) 745, the same court held it to be immaterial that the insurer's local agent had notice before delivery of the policy that the insured did not own the insured property in fee, since there could be a waiver only by a writing endorsed on the policy. And in *Northwestern Nat. Ins. Co. v. McFarlane* (C. C. A.), 50 F. (2d) 539, it was again reiterated that where a policy provides that no agent can waive any of the terms of the policy except by written endorsement, the knowledge of the agent does not waive breach of a condition in the policy. See, also, to the same effect, *Home Ins. Co. v. Scott*, 284 U. S. 177, 52 S. Ct. 72, 76 L. Ed. 229.

"Since in the case at bar the most that an inquiry could have done would have been to give the insurance company or its agent knowledge of the existence of the chattel mortgage, the foregoing decisions are authority for holding that the failure to inquire does not constitute a waiver of the violation of the provisions of the policy. It follows that the decision here will be the same as in the suit brought against the Westchester Fire Ins. Co."

The rule laid down by Judge Knox in the foregoing quotation, to-wit, that it is competent for parties to stipulate in their contracts that the terms thereof may not be

changed or waived, except in the manner provided for therein, to-wit, by agreement in writing endorsed thereon or added thereto, and that such stipulations must be given full force and effect, is the rule in this jurisdiction and in the state courts of California. This has been the rule in the United States Supreme Court since, and even before, the decision in the case of *Northern Assur. Co. v. Grandview Building Assn.*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213.

It has been cited and followed down to the latest case on the point:

Home Ins. Co. v. Scott, 284 U. S. 177, 76 L. Ed. 230.

See also:

Penman v. St. Paul F. & M. Ins. Co., 216 U. S. 311, 54 L. Ed. 493.

It is also the rule in this circuit.

See:

Boston Ins. Co. v. Hudson, 11 F. (2d) 961 (9th Cir.);

Northwestern Nat. Ins. Co. v. McFarland, 50 F. (2d) 539 (9th Cir.);

Fidelity Union Fire Ins. Co. v. Kelleher, 13 F. (2d) 745 (9th Cir.).

It is also the rule in the other Federal circuits.

Hartford Fire Ins. Co. v. Nance, 12 F. (2d) 575;

Fischer v. London & L. Fire Ins. Co., 83 Fed. 807;

Scottish Union v. Encampment Smelting Co., 166 Fed. 231;

Mulrooney v. Royal Ins. Co., 163 Fed. 833;

Mo. Pacific Railway Co. v. Western Assur., 129 Fed. 610;

Maryland Cas. Co. v. Eddy, 239 Fed. 477.

It is also the rule in the appellate and Supreme Courts of the State of California.

See:

Fidelity Co. v. Fresno Flume Co., 161 Cal. 466,
where the Court quotes and follows the *Northern
Assur. v. Grand View Building Assn.* case.

See:

Hargett v. Gulf Ins. Co., *supra*;

Wilson v. Maryland Cas. Co., 19 Cal. App. (2d)
463, 65 P. (2d) 903, citing and following *Lum-
bermen's Undrs. v. Rife*, *supra*, and *Hargett v.
Gulf Ins. Co.*

See also:

Shuggart v. Lycoming Fire Ins. Co., 55 Cal. 408;

Enos v. Sun Ins. Co., 67 Cal. 621;

Farnum v. Phoenix Ins. Co., 83 Cal. 246;

Slade Lbr. Co. v. National Surety Co., 128 Cal.
App. 420, 17 P. (2d) 775;

Iverson v. Met. Life Ins. Co., 151 Cal. 746;

Valentine v. Head Camp, P. J., W. O. W., 180 Cal.
192.

Appellants argue one other proposition under the heading "Insurance Contracts Should Be Construed to Protect the Interests of the Assured Wherever Possible." (App. Br. p. 25.)

Just what appellants mean by this they do not say in their argument, but if they are attempting to demonstrate the familiar rule that ambiguous provisions of a contract are to be construed most strongly against the parties proposing the contract, and that this applies to insurance contracts as well as others, we can go along with them on the proposition of law, even though it has been doubted that this rule applies where a statutory form of contract is to be interpreted.

However, in this case there has been not the slightest suggestion that there is any ambiguity or need for interpretation of the clause under discussion, and, indeed, there can be none in view of the multitude of cases such as those heretofore cited which have applied to this clause without ever a suggestion that there was any ambiguity in it.

But we think the rule of construction is as firmly established to require more than a mere statement of it:

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, *and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.*"

Imperial Fire Ins. Co. of London, England, v. County of Coos, 151 U. S. 462, 38 L. Ed. 231.

Cases Cited by Appellants.

As previously stated, appellants have not cited, and, indeed, cannot cite, a single case contrary to the decision of the trial court in this case, but, on the contrary, have cited and quoted isolated bits of dicta from cases not in any way analogous to the present case, and have used and quoted certain expressions of courts used *arguendo* in deciding totally unrelated cases.

For example, the first case cited by appellants, *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, was decided prior to the adoption of the standard policy, and involves a clause entirely different from the clause under consideration here, a clause which was in the nature of a warranty, the breach of which voided the policy.

The *Raulet* case was considered by Judge Knox in the above-cited case of *Cinema Schools v. Westchester Fire Ins. Co.*, 1 Fed. Supp. 37, and the distinction between the two clauses pointed out.

Likewise, in the case of *Hargett v. Gulf Ins. Co.*, cited *supra*, the Court, noting this distinction, said:

“The rule would be applicable here if the breach had been one which avoided or forfeited the policies. Such, however, is not the case.”

Moreover, the real decision made in the *Raulet* case, as shown in the very quotation from the case on page 9 of Appellants' Brief, was that the Court decided that the document called a chattel mortgage was not such a chattel mortgage as was contemplated by the policy.

The next California case cited by appellants is the case of *Kavanaugh v. Franklin Fire Ins. Co.*, 185 Cal. 307 (App. Br. p. 19), from which appellants quote at some length.

The quotation from this case, found on pages 19 and 20 of Appellants' Brief, is a clear demonstration of the vice of quoting as authority argumentative language and dicta when the true decision was exactly to the contrary.

In this case the Court, holding that the plaintiff could not recover under the facts, reversed the trial court, and, in the paragraph immediately following the portions quoted by the appellants, announce through Judge Wilbur its decision in the following language:

"This much is clear, at least, that both parties to the fire insurance policy must be deemed to have entered into a contract with reference to the statutory form. In other words, the statutory form is the commodity which is bought and sold in an insurance transaction. The policy in this case, as already stated, was void *ab initio*. It can only be given validity as against the insurance company by the applications of the principles of waiver and estoppel. It cannot be said that the insurance company waived this condition of the policy because the company knew nothing of the changed ownership of the premises. (*Bryant v. Granite Fire Ins. Co.*, 174 Mich. 102, 107 [140 N. W. 482]; *Dahrooge v. Sovereign Fire Assur. Co.*, 175 Mich. 248, 251 [141 N. W. 572].)"

The next California case cited by appellants, *Dunne v. Phoenix Ins. Co. of Hartford, Conn.*, 113 Cal. App. 256 (App. Br. p. 21), involved the question of the extent of the insurable interest of the assured in the property, and the Court, holding that the assured being a purchaser of personal property, although he had not fully paid the purchase price, had an insurable interest, and followed the general rule that where the assured has an insurable interest the policy will not be *void*, even though the interest was less than sole and unconditional.

This case did not involve, as does the present case, and the cases heretofore cited by appellees, the question of the basis of the contract of what property was covered by the policy, and the distinction is as shown in the foregoing quoted portions from the *Hargett* and similar cases.

Appellants' next case is *Kahn v. Commercial Union Fire Ins. Co.*, 16 Cal. App. (2d) 42, and is practically identical with the case of *Dunne v. Phoenix Ins. Co.* just referred to, and again in this case the Court held that the interest of the assured, although not sole and unconditional, was sufficient to satisfy the sole and unconditional ownership clause, and the fact that another had an interest in the property was not sufficient to void the policy. The questions raised in this case neither raised nor considered.

In the case of *Bass v. Farmers' Mutual Protective Fire Ins. Co.*, 21 Cal. App. (2d) 26 (App. Br. p. 21), the assured disclosed all of the material facts to the insurer's agent, and either through fraud or mistake of the agent,

the facts were not correctly recorded, with the effect that assured's interest was less than sole and unconditional, although the assured had a substantial insurable interest in the property. No question of the property covered was in any manner involved.

The case of *Sam Wong v. Stuyvesant Ins. Co.*, 100 Cal. App. 109 (App. Br. p. 23), was a case involving not a provision relating to the coverage of the policies but a provision which rendered the policy void if the interest of the assured be other than unconditional and sole ownership. The Court specifically found that the assured was the unconditional and sole owner, and, in consequence, the language used had reference to this decision.

The case of *Ames v. Employers' Cas. Co.*, 16 Cal. App. (2d) 255 (App. Br. p. 24), is not remotely in point, as there the Court found there was an actual waiver of the warranty, and that the misrepresentation was made not by the assured but by the company's agent.

Appellees do not feel called upon to burden this brief further by an analysis or criticisms of the few cases cited by appellants from outside jurisdictions (App. Br. p. 20), as the proposition under which these cases are cited is not in any manner germane to the issues here.

Trial Court Did Not Err in Denying Appellants' Motions for New Trial and to Amend Findings, Conclusions, and Judgment.

Although appellants assign as error (in fact, this is the only error assigned) that the trial court erred in denying the appellants' motions for new trial and in denying appellants' motions to amend Findings of Fact and Conclusions of Law, and to Direct Entry of New Judgment, they nowhere argue or present any authority to show wherein such error lies. Therefore, appellees will content themselves on this point with a statement of a single well-settled rule—that orders denying a new trial are not reviewable on appeal in the absence of a showing of a clear abuse of discretion, which has not been shown here.

U. S. v. Bransen, 114 F. (2d) 232 (9th Cir.).

Appellees respectfully submit that the trial court did not err in any of its rulings or in entering judgments for appellees, and that, therefore, the decision and judgment of the trial court should be sustained.

Respectfully submitted,

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Nos. 11775 and 11776

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11775

LAURA GAWECKI and COLLETTE MITRE, doing business
under the fictitious name of SKYLARK CAFE & RESTAU-
RANT,

Appellants,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corpora-
tion,

Appellee.

No. 11776

LAURA GAWECKI and COLLETTE MITRE, doing business
under the fictitious name of SKYLARK CAFE & RESTAU-
RANT,

Appellants,

vs.

DUBUQUE FIRE AND MARINE INSURANCE COMPANY OF
DUBUQUE, IOWA, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

CASES	PAGE
Allen v. Home Insurance Company, 133 Cal. 29.....	3, 5
American Employers Insurance Co. v. Lindquist, 43 Fed. Supp. 614	8, 9
Ames v. Employers Casualty Co., 16 Cal. App. (2d) 255.....	8
Arnold v. American Insurance Company, 148 Cal. 660.....	3, 5
Cinema Schools v. Federal Union Fire Insurance Company, 1 Fed. Supp. 43.....	4
Conner v. Union Automobile Insurance Company, 122 Cal. App. 105	3
Dunne v. Phoenix Insurance Co. of Hartford, Conn., 113 Cal. App. 256	9
Golden Gate Motor Transport Company v. Great American In- demnity Company, 6 Cal. (2d) 439.....	6
Hargett v. Gulf Insurance Company, 12 Cal. App. (2d) 449.....	3
National Reserve Insurance Company v. Ord, 23 F. (2d) 73....	10
Sam Wong v. Stuyvesant Insurance Company, 100 Cal. App. 109	7
Sharp v. Scottish Union etc. Co., 136 Cal. 542.....	8
Steil v. Sun Insurance Office, 171 Cal. 795.....	4, 10

STATUTES

Civil Code, Sec. 3440.....	2
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DUBUQUE, IOWA, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

Before considering the arguments advanced by the Appellees, the Appellants wish to correct an erroneous statement of fact on page 17 of the Appellees' brief.

The Appellees there stated that "To briefly recapitulate the facts relating thereto, we find first that the chattel mortgages were, in the case of the General policy, executed after, and not before the policy was applied for and become effective. And as to the Dubuque the negotiations for the insurance were prior to the execution of the chattel mortgages."

This is incorrect. The findings of fact prepared by the Appellees for the signature of the trial court, make it unmistakably clear that the chattel mortgages in question were in existence before either policy was issued; moreover, the notice of intention to mortgage was published in accordance with Section 3440 of the Civil Code of California prior to the issuance of either fire insurance policy. As regards the policy issued by the General Insurance Company of America, the trial court made the following finding:

"That at the time of the issuing of said policy the plaintiffs were not the sole and unconditional owners of the personal property located at 7519 Sunset Boulevard, and there was at the time of the issuing of said policy in full force and effect a chattel mortgage on said property issued by plaintiffs to Walter J. McCormick and Edward A. Mattin."
[General Tr. p. 23.]

A similar finding was made regarding the policy issued, or more appropriately, assigned by the Dubuque Fire and Marine Insurance Company to the Appellants:

"As to paragraph XI of plaintiff's complaint, the Court finds that at the time of the issuing of defendants' policy and at all times thereafter and at the time of the occurrence of the fire loss and damage described in the complaint, the plaintiffs were not the

sole and unconditional owners of the personal property located at 7519 Sunset Boulevard. . . .”
[Dubuque Tr. p. 22.]

Hence, Appellants’ argument will be made with reference to the foregoing facts: that the both policies were issued after the property in question was mortgaged.

The argument so ably, if somewhat impatiently, presented by the Appellees is as significant for its omissions as it is for its substance. In their opening brief, the Appellants emphasized that in order to assert successfully the breach of a provision of a fire insurance contract by way of defense, that breach must have been material to the risk assumed by the insurer. Moreover, the significant silence of the Appellees is a mute affirmation of the truth of this proposition.

Necessarily, the Appellees’ brief is predicated upon the assumption that a chattel mortgage on the insured property materially affects the risk assumed by the insurance company. If this be assumed, it is important to bear in mind the distinction in legal effect that arises when the chattel mortgage is placed on the property after the policy has been taken out as opposed to the situation where the property was subject to a chattel mortgage at the time the insurance was issued, as in the case at bar.

The Appellees have cited five decisions of the California appellate courts to support their contention that the existence of the chattel mortgage on the insured property gives them a valid defense: *Hargett v. Gulf Insurance Company*, 12 Cal. App. (2d) 449; *Arnold v. American Insurance Company*, 148 Cal. 660; *Allen v. Home Insurance Company*, 133 Cal. 29; *Conner v. Union Automobile Insurance Company*, 122 Cal. App. 105; *Steil v.*

Sun Insurance Office, 171 Cal. 795. In each of the decisions the insured has voluntarily done something *after* the policy has been issued in violation of the terms of the policy, which can be fairly said to have materially affected the risk. Therefore, the insurance company was not held liable for the resulting loss. Such a conclusion is sound because it would be unjust to hold that an insurance company had waived a breach of some provision of the policy of which it had no knowledge and where inquiry could not have revealed such a breach. However, the Appellants reemphasize that such is not the case presently before this court. Here, the Appellants did *absolutely nothing after the policy was issued*. This risk remained unchanged from the inception of the insurance until the loss.

The Appellees did cite one case, arising in the United States District Court Southern District of California, *Cinema Schools v. Federal Union Fire Insurance Company*, 1 Fed. Supp. 43, in which it was held that it made no difference whether the chattel mortgage on the insured property was executed before or after the policy was issued. This decision is quoted in its entirety on pages 19 and 20 of Appellee's opening brief. From a reading of the cases on this point, it is apparent that Judge Jenny misapplied the law of California. He concluded, as the Appellees would have this court do, that the provision of the California statutory fire insurance policy to the effect that any provision of the policy can be waived only by a written endorsement attached thereto must be literally applied at all times. He then makes this amazing statement:

"Since in the case at bar the most that an inquiry could have done would have been to give the insurance

company or its agent knowledge of the existence of the chattel mortgage, the foregoing decisions are authority for holding that the failure to inquire does not constitute a waiver of the violation of the provisions of the policy."

Even the California cases cited by the Appellees contradict such a statement, which is clearly erroneous. For example, the following quotation is from the syllabus to *Arnold v. American Insurance Company*, 148 Cal. 660:

"Notwithstanding a printed stipulation that any waiver must be made in writing and attached to the policy, such stipulation could not prevent the conduct of the officers of the company from constituting a waiver or estoppel of the company based upon its presumed knowledge, when its proper officer had knowledge, when such conduct led the insured to rely on his policy as a valid policy, although there was a breach of condition of which the company knew, in which case, it will not be heard to allege such breach against a claim for subsequent loss."

Again from the syllabus of another case cited by Appellees, *Allen v. Home Insurance Company*, 133 Cal. 29:

"Where the only interest of the plaintiff in the insured premises was that of a mortgagee, which, by the terms of a stipulation in the policy, would vitiate it, as being 'other than the entire unconditional and sole ownership of the property,' if it appears that the insurance company knew the extent of the plaintiff's interest, and issued the policy to the plaintiff with such knowledge, all conditions inconsistent therewith were waived by such issuance."

Hence, it is submitted that, upon careful analysis, the authorities cited by the appellees do not support their arguments.

The basic issue in this appeal is whether the existence of a chattel mortgage, which had been executed before the issuance of the insurance policies, will avoid liability, where the insurer made no inquiry regarding the insureds title. Mrs. Gawecki's and Miss Mitre's intention was that they should be protected against loss if their property should be destroyed by fire. The insurance companies knew this was their intention and, presumably, by accepting the premiums paid by the Appellants and issuing policies of insurance to the applicants, the Appellees manifested an intention to insure the Appellants' property against fire loss. Certainly, the Appellants had no reason to believe otherwise. In situations such as this, the insurer, making no inquiry, cannot defend on the ground that a provision of the policy had been breached from the start. The California appellate courts have uniformly held that if the applicant had an *insurable interest* in the property, he can recover from the company. In the case of *Golden Gate Motor Transport Company v. Great American Indemnity Company*, 6 Cal. (2d) 439, at page 446, the court states as follows:

“ . . . There is no conflict in the evidence to the effect that the plaintiff had an insurable interest; that the defendant made no inquiry as to how the registration of the Hudson sedan stood; that it asked for no written application covering by question and answer the material provisions of the policy; and that it made no examination of the records of the Motor Vehicle Department. Nevertheless it rendered its bill for the premium, collected it, and still retains it.

There is not a particle of a claim that the plaintiff made false representations, nor is there any claim that the defendant did in any manner call to the plaintiff's attention the registration clause. Such facts have been held sufficient to establish a waiver. (*Raulet v. Northwestern etc. Ins. Co.*, *supra*; *Sam Wong v. Stuyvesant Ins. Co.*, 100 Cal. App. 109; 5 Cooley's Brief's on Ins., 4226.)"

And in *Sam Wong v. Stuyvesant Insurance Company*, 100 Cal. App. 109, at page 112 the court says:

"Moreover defendant is in no position to set up as a defense lack of ownership or that the insured did not own the ground on which the building was situate, as it waived objection to the form of the policy and is estopped from denying liability thereunder by issuing the policy and accepting the premiums therefor without any written application having been made by the insured, and also without any discussion having been had relative to either title to the property on which the same was situate. Plaintiff herein, as owner, had an insurable interest in the building, he being in possession and operating the same as a dryer. (14 Cal. Jur., p. 465; 14 R. C. L. 915.) Prior to the adoption of the standard form of policy in this state it was held that where the assured had an insurable interest in property, and without fraud, in good faith applied for insurance upon the same, and made no actual misrepresentation or concealment of his interest therein, and the insurance company made no inquiry concerning his interest, and issued a policy to him, and accepted and retained the premium, the company must have been presumed to have knowledge of the condition of the title, and to have assured the property with such knowledge. (*Raulet v. North-*

western etc. Ins. Co., 157 Cal. 213-228; 14 R. C. L., pp. 926-932.) After the adoption of the standard form of policy, the law of waiver and estoppel remained the same as before upon this subject. (*Kavanaugh v. Franklin Fire Ins. Co.*, 185 Cal. 307, 315; 14 R. C. L., p. 932.)”

See also:

Ames v. Employers Casualty Co., 16 Cal. App. (2d) 255;

Sharp v. Scottish Union etc. Co., 136 Cal. 542;

American Employers Insurance Co. v. Lindquist, 43 Fed. Supp. 614.

Moreover, it is to be observed that the aforementioned cases demonstrate unequivocally that the California courts do not always hold that the clear and unambiguous terms of an insurance contract will always be literally followed, as the Appellees on page 23 of their brief suggest, for in these cases, the insurance policies, conforming to the mandate of the California statute, have a clause which provides that the interest of the insured in the property *must be sole and unconditional*. However, where the insurer has made no inquiry or where it has and there has been no fraud or misrepresentation by the applicant, it is consistently held in California that the insurance company waived this provision. The insistence of the California courts that the purpose of insurance will be fulfilled where the applicant has made no misrepresentations to the insurance company and that the latter will not be heard to deny liability on the ground that one of the many provisions of the policy has been violated, having made no inquiry, was recognized by Judge Fee in the case

of *American Employers Insurance Company v. Lindquist*, 43 Fed. Supp. 614, decided while he was sitting in the Ninth Circuit. In that case he stated:

“The contention is that since Lindquist received the policy and kept it for a period of time before the loss he is somehow estopped to claim that he made no representations. This is drawing a long bow. But the California courts have clearly answered this proposition also. It is well settled in this state that where there is no fraud or misrepresentation and no written application and no inquiry into the particular subject, the failure of the insured to discover a false statement inserted by the insurer in the policy is not a defense. The technical nature of these documents is sufficient excuse for failure of the insured to read a policy or to understand it when read.”

Indeed, in their comments on *Dunne v. Phoenix Insurance Co. of Hartford Conn.*, 113 Cal. App. 256, on page 26 of their brief, the Appellees concede that had the Appellants purchased the property under a conditional sales contract, they could have recovered. But because they used the other method, that of a purchase and the execution of a chattel mortgage, the Appellees' would ask this court to hold that the consequences are so dire that there is no liability. This is sophistry in an unadulterated form.

The tortuous path of the Appellees' reasoning is further manifested on pages 9, 10, and 14 of their brief. There it is urged that the existence of the chattel mortgage did not void the policy, but merely suspended it, and therefore, some consequences, which utterly escape the Appellants, must necessarily result. First of all, it would have been just as easy for the California courts to have held

that where the interest of the insured was that of a vendee under a conditional sales contract, the insurance was merely suspended, but not void. Instead, they held that where no inquiry was made by the insurance company, the insurance was neither suspended nor void, but was in full force and effect. The chattel mortgage situation presents the same issues, and should be decided in the same way. Secondly, the word "suspension" implies that the insurance may reattach at a later date. This is impossible in the case at bar since the *res* insured was completely destroyed. The result is that the appellees insist that they should be paid substantial premiums for never having assumed any risk whatsoever. This does not square with elementary concepts of justice.

Finally, it should be noted that the appellees state that in some way the existence of the chattel mortgage changed the specification of the property insured. The cases cited by the appellees do involve such a proposition. In *Steil v. Sun Insurance Office, supra*, the insurer covered the goods only while they were in the Chronicle Building, and in *National Reserve Insurance Company v. Ord*, 23 F. (2d) 73, the insurer covered the premises only while they were used as a packing plant. Unquestionably, the policies involved in both of these cases were issued as a result of applications in which the property was represented to be as it was described in the insurance policies subsequently issued. However, in the case at bar, no representation that the property was not subject to a chattel mortgage was made by the applicants, and it is most illogical and unwarranted to cite these cases to support the contention that the property destroyed by the fire in this case was different from that described in the applications of the appellants.

Conclusion.

The basic facts of this appeal are simple. A mother and her daughter, neither of whom was experienced in business, purchased a restaurant. They made a substantial down payment and executed a chattel mortgage to secure the payment of the balance. They wanted their investment covered by fire insurance and contacted an insurance agent they had known and trusted for many years. They advised the latter of all of the facts, including the fact of the chattel mortgage. She, in turn, placed the insurance with the appellees, neither of whom made any inquiry concerning the insured property. These ladies dealt in utmost good faith with the appellees and their agents, trusting the latter to provide them with the protection they desired and for which they paid the premiums demanded by the Appellees. Where the indifference of the insurer to the nature of the risk it has assumed is as manifest as it was in this case, these trusting individuals had every right to believe that they had received the protection they purchased. Under such circumstances, the insurer should not be heard to say, after a fire, that it has been paid to assume no risk whatsoever. It is difficult to see how fairminded men *can* disagree on the basic law and equities of this case.

Respectfully submitted,

GEORGE PENNEY,

ROBERT M. NEWELL,

Attorneys for Appellants.

No. 11779

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. R. MASON,

Appellant,

VS.

PARADISE IRRIGATION DISTRICT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED
JAN 10 1948

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE.
Appeal:	
Certificate of Clerk, U. S. District Court to Transcript on.....	37
Designation of Additional Contents of Rec- ord on	36
Designation of Contents (CCA) on.....	38
Designation of Record on.....	35
Notice of.....	32
Statement of Points on.....	33
Attorneys of Record.....	1
Brief of Paradise Irrigation District.....	23
Certificate of Clerk, U. S. District Court to Transcript on Appeal.....	37
Designation of Additional Contents of Record on Appeal.....	36
Designation of Contents of Record on Appeal..	35
Designation of Contents of Record on Appeal (CCA)	38
Final Decree	26
Letter 12/2/46, Peters and Peters.....	22

Mandate of United States Circuit Court of Appeals	2
Notice of Appeal.....	32
Objections to Proposed Final Decree.....	5
Points and Authorities in Support of Objections to Proposed Final Decree.....	7
Report of Disbursing Agent.....	4
Registry Docket Page.....	5
Reply Brief of J. R. Mason.....	25
Statement of Points on Appeal.....	33
Statement of Points on Which Appellant Intends to Rely.....	40

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MANDATE OF UNITED STATES CIRCUIT
COURT OF APPEALS

United States of America—ss.

The President of the United States of America to
the Honorable the Judges of the District Court
of the United States for the Northern District
of California, Northern Division, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of California, Northern Division, before you, or some of you, in the Matter of Paradise Irrigation District, Debtor, No. 703, an interlocutory decree was duly filed on the 3rd day of February, 1941, as amended by order of November 24, 1943, which said decree is of record and fully set out in said matter in the office of the Clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by J. R. Mason, as appellant, against Paradise Irrigation District, as appellee, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 26th day of March in the year of our Lord One Thousand Nine Hundred and Forty-five the said cause came on to be heard before the said Circuit Court of Appeals, on the said

Transcript of the Record and was duly submitted: [1*]

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

(May 11, 1945.)

You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Harland Fiske Stone, Chief Justice of the United States, the 12th day of June in the year of our Lord One Thousand Nine Hundred and Forty-five.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Amount of costs allowed and taxed in favor of appellee and against appellant as per annexed Bill of Items, Taxed in Detail: \$20.00.

PAUL P. O'BRIEN,

Clerk.

[Endorsed]: Filed June 13, 1945. C. W. Calbreath, Clerk. [2]

* Page numbering appearing at foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

REPORT OF DISBURSING AGENT

To the Honorable Martin I. Welsh, Judge of the
above entitled Court:

The undersigned, Bank of America, National Trust and Savings Association, a national banking association, hereby reports to you in connection with its trust in duties as disbursing agent, to which it was appointed by the Interlocutory Decree entered herein upon February 3, 1941, as amended November 24, 1943, as follows:

I.

That said disbursing agent has received the sum of Fifteen Thousand Two Hundred Thirty-one and 09/100 (\$15,231.09) Dollars, with which to pay to J. R. Mason, the only bond holder of the company who did not consent to the composition, the sum of 52.521 cents on each dollar on the unpaid principal amount thereof, said J. R. Mason, owning bonds of the face value of \$29,000.00.

II.

That no old bonds or other bonds have been paid by it.

III.

That the money now in the hands of the disbursing agent for the purpose of paying the composition figure on the principal of said outstanding bonds is the sum of Fifteen Thousand Two Hundred Thirty-one and 09/100 (\$15,231.09) Dollars. [3]

IV.

That herewith there is transmitted to the Registry of the above named United States Court the last mentioned sum, namely, Fifteen Thousand Two Hundred Thirty-one and 09/100 (\$15,231.09) Dollars.

Respectfully submitted,
BANK OF AMERICA,
NATIONAL TRUST AND
SAVINGS ASSOCIATION,

By J. J. MADIGAN,
Trust Officer.

[Endorsed]: Filed Nov. 15, 1946. C. W. Calbreath, Clerk. [4]

REGISTRY DOCKET PAGE

Title: Paradise Irrigation District

Docket: 7703

Depository

11-15-46 Received from Disbursing Agent 15,231.09

[Title of Court and Cause.]

OBJECTIONS TO PROPOSED FINAL
DECREE

Comes now, J. R. Mason, the sole creditor of the above named Political Subdivision of California affected by the proposed decree, and states that he

has through courtesy of his former attorney W. Coburn Cook just received a copy of the proposed Final Decree Discharge and Order Settling Report and Account of Disbursing Agent herein and objects to the proposed Final Decree and to the proposed draft thereof in the following respects:

1. Said creditor objects to that provision which limits the time allowed within which to accept the funds in the registry of this Court to 12 months, as being without warrant of law, and also as in conflict with Title 28 of the Judicial Code, Secs. 851, 852 which govern the administration of such funds in the Registry of this Court, and which contain no time limitation within which valid claims against such funds may be presented.

2. Objects to that part of the proposed Final Decree which provides that the holders of certain bonds are restrained and permanently enjoined from asserting any claim or demand whatsoever . . . as against the petitioning district.

3. Objects to provisions in the proposed Final Decree which may violate the explicit limitations upon the jurisdiction and authority delegated to its Courts by the Congress, when enacting 11 USCA 401-404, P.L. 481, Ch. 532, Stat. Sec. 13 as amended June 30, 1946, especially those limitations in Sec. 403c, sub(a); 403c, sub(6); 403i; and which may also violate the vested property rights in the bonds held by J. R. Mason that are secured by the Constitutions of the [6] U. S., and of the State of California. (Art. 1, sec. 10, Cl. 1; Fifth,

Eleventh, Fourteenth and Sixteenth Amendments of the U. S. Constitution; and Art. 6, sec. 13; Art. 1, sec. 16; Art. 4, sec. 25, sub 16; Art. 4, sec. 31 of the California Constitution.)

Dated November 27, 1946.

/s/ J. R. MASON,
Objecting Bondholder,
in Pro se.

1920 Lake Street,
San Francisco 21, Calif.

[Endorsed]: Filed Nov. 29, 1946. C. W. Calbreath, Clerk. [7]

[Title of Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF OBJECTIONS TO PROPOSED FINAL
DECREE

The only purpose of a Final Decree is that of determining that the Bankrupt has made available to creditors the money or other consideration called for by the Interlocutory Decree.

In the U. S. v. Bekins, 304 U. S. 27, case, the Court pointed out that the Ashton, 298 U. S. 513, decision holding the original Ch. IX invalid was based on the thought that the Statute might be so applied as to be repugnant to the traditional doctrine of immunity, and then announced that the amended Ch. IX is "especially solicitous to afford no ground for this objection."

The original statute provided that the Court, even in the Interlocutory Decree, could make the Plan of Composition binding on the Debtor, but the present statute contains no such a provision.

The theory of it seems to be that the Plan of Composition shall be approved by the Interlocutory Decree, and the petitioner is "authorized by law to take all action necessary to be taken by it to carry out the plan" (Sec. 403(e), sub 6, and certain other conditions "Thereupon the court shall enter a final decree determining that the petitioner has made available for the creditors affected by the plan the consideration provided for therein and is discharged from all debts and liabilities dealt with in the plan, . . ." (11 USCA 403 (f).)

In fact, the only thing done by the Final Decree is to enable the Court to verify that the bankrupt has made available [8] the money or other consideration called for in the Interlocutory Decree, and to decree that the plan is binding on the creditors affected by the plan and discharging the bankrupt except as provided therein.

Nothing in the statute places any limitation on the time within which a creditor may present his claim and get the money on deposit with the Court. (11 USCA 401-404.) Nothing in the Plan of Composition nor in the Interlocutory Decree provided for or authorized the insertion of the time limitation in the proposed Final Decree, and petitioner cannot point to any provision in any applicable law, authorizing the 12 month time limitation, or any other limitation on the period within which the

money in the Registry of this Court may be claimed by any person showing a legal right in and to it.

Petitioner has not attempted to show or establish any right, title or interest in or to the funds in the registry of this Court, either now, or a year from now, or at any other future time or event. That funds similarly placed in the registry of this Court do not and cannot be validly claimed as property of the bankrupt was settled by the Court above, in the very recent case of *Bekins v. Compton Delevan I.D.*, 150 Fed. (2d) 526, and *Certiorari* was denied by the U. S. Supreme Court.

The 12 month time limitation in the proposed Final Decree is not permitted by the provisions of Title 28 Judicial Code, Secs. 851, 852 which rule the rights of all parties making claims in or to the funds deposited with the Court, as Registrar, in proceedings like this.

In Section 204 of the Chandler Act (11 USCA § 604) Congress did give its Courts jurisdiction to "fix a time, to expire not sooner than five (5) years after final decree . . . [9] within which . . . holders . . . shall present or surrender their securities," but the omission of any such limitation in 11 USCA 401-404, the base of this proceeding (P.L. 481, Ch. 532, Stat. Section 13, as amended June 30, 1946) is proof that the Congress was willing that State law and decisions remain supreme as regards any statute of limitations.

"To effect a forfeiture, which the law does not favor, the evidence must be clear and con-

vincing and must not call upon a court of equity to do an inequitable thing.”

Hendrix v. Altman Lbr. Co., 145 F. (2d) 501, CCA 5.

The rule applicable to funds in the registry of this Court, in proceedings under other sections of the Bankruptcy Act, are reviewed in the following recent cases:

Louisville & RR Co. v. Robbins, 135 Fed. (2d) 704, CCA 5;

In re Peyton Realty Co., 148 Fed. (2d) 771, CCA 3.

“Federal Courts should scrupulously confine their own jurisdiction to the precise limits which the Statute conferring jurisdiction has defined.”

In re Hartford Acc. Inc. Co., 39 F. Supp. 475.

“The well settled principle of law is that jurisdiction of subject matter may not be conferred upon a tribunal by consent. Nor can jurisdiction be construed to have been acquired by a court because of the consent of one of the parties to a submission of litigation to the court, when in fact and in law, the court is without power to act. Since the jurisdiction of the subject matter cannot be conferred by consent, it can less so be acquired by inference.”

Vaughan v. Vaughan, 35 NYS (2d) 421.

In Dobie, on Federal procedure, Sec. 16, p. 25, it is stated:

“Every federal court is a court of limited jurisdiction. All presumptions are against the jurisdiction of such a court, so that the facts disclosing the jurisdiction must affirmatively appear upon the record.”

In the very recent case of *Berry v. Root*, 148 F. (2d) 945, the Fifth Circuit Court of Appeals ruled that in cases under 11 USCA 401, 404, which is the base of this cause, the Bankruptcy Court

“is not a court of equity but a statutory court created by the Bankruptcy Act and governed by it.”

No interest accrues on the funds in the registry of the Court, and the modification requested can therefore be subject to no valid objection by the debtor, even if the 12 months limitation period had been authorized by any law.

There are, on the other hand, vested property rights under the laws of California embodied in the bonds held by J. R. Mason which are not affected or covered by anything in the Interlocutory Decree of this Court, one of which was construed in the case of *Nevada Bank v. Board of Supervisors of Kern County*, 5 C.A. 638, 91 Pac. 122, and should these bonds have to be presented before the State Courts have passed upon these rights, and actually be physically cancelled by the debtor, the effect of such cancellation on the obligation of tax defaulting and tax evading private land title

holders within the District has been recently construed by the California Courts in *Siwel & Co. v. County of Los Angeles*, 27 Cal. (2d) 724; *Raisch v. Myers*, 27 A.C. 27, p. 793; *Ward v. Chandler Sherman Corp.*, 76 ACA 453.

J. R. Mason would for these and other substantial reasons be injured if the time limitation in the proposed decree should not be stricken from it.

The final decree in the Matter of Glenn Colusa Irrig. Dist., in Bankruptcy, No. 29763L, Southern Division of this Honorable Court, contained no time limitation whatever within which claims must be presented, and numerous other final decrees executed under the provisions of 11 USCA 401-404 contain no time limitation.

2.

It is respectfully submitted that the injunctive restraints in the proposed final decree are inconsistent with Title 11, Sec. 383 in that it does not explain the act or [11] acts covered by the decree. As a matter of fact, petitioner is without any pecuniary rights, being only a Public Trustee whose rights, powers and duties are fixed and governed by State law, exclusively.

Fallbrook v. Bradley, 164 U. S. 112;

Herring v. Modesto, 95 Fed. 705;

Meyerfeld v. S.S.J., 3 Cal. (2d) 409;

Shouse v. Quinley, 3 Cal. (2d) 357;

Provident v. Zumwalt, 12 Cal. (2d) 365;

Fallbrook v. Cowan, 131 Fed. (2d) 513 (Cert. denied);

Happy Valley v. Thornton, 1 Cal. (2d) 325;
In re Horse Heaven L.D., 11 Wash. (2d) 218;
U. S. v. Greer Dr. Dist., 121 F. (2d) 675.

A further ground for objecting to the restraints in the proposed decree is because, as they would apply in the instant case, they are not authorized in a final decree, and would violate the prohibitions in 11 USCA § 1, sub (14)(15); 11 USCA § 1, §§ 107, sub. b. 205; §§ 104, sub. a(4); 28 USCA § 378; 28 USCA § 41(1), sub. (3); 40 USCA § 258a; R.S. § 720; 11 Am. Jur. Conflict of Laws § 30.

See

Arkansas Corp. v. Thompson, 312 U. S. 673,
313 U. S. 132;

Faitoute v. Asbury Park, 316 U. S. 502, 508;
Huddleson v. Dwyer, 322 U. S. 232.

“An injunction restraining the collection of taxes in a State court—a stay not being authorized by any law relating to bankruptcy, is prohibited by 265 Judicial Code, § 28 USCA § 379.”

Brick v. McColgan, 39 F. Supp. 358.

Petitioner, being a statutory trust with fixed and continuing responsibility and duty to levy and collect direct ad-valorem land taxes, as construed in the cases above cited, and without personal pecuniary interest would not be subject to injury of any kind even if some holder of securities should institute an action in the State Court, because no property of the debtor is subject to execution, it being property owned by the State.

El Camino v. El Camino, 12 Cal. (2d) 378.

At bottom, the only interest that might be affected by any State court proceeding, are the holders of title to land made subject to tax upon the borrowing of the money received by the District for the bonds, and whose responsibilities under this State law have been fixed by *Fallbrook v. Bradley*, 164 U. S. 112, and innumerable subsequent federal and state court judgments, which are *res judicata* of issues involved in a land title.

Browning v. Burton, 155 F. (2d) 561. *Certiorari* denied Nov. 12, 1946, 15 U. S. L.W. 3186. Petition No. 542, Oct. Term 1946.

See also

In re *Walter*, 67 F. Supp. 925 (N.Y. D.C.)

The only time any injunction is allowed under 11 USCA 403, is before final decree, as clearly provided in Sec. 403(c) which reads that upon the entry of the order fixing the time for original hearing the judge may, upon notice, enjoin suits against the petitioner pending determination of the petition, which means until the main hearing and determination thereon.

“The scrupulous regard for the rightful independence of State governments which should at all times actuate the Federal Courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted Federal right may be preserved without it . . .

If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the State courts from which the cause may be brought to this Court for review if any federal questions be involved.”

Great Lakes Dredge & Dock Co. v. Huffman,
391 U. S. 293.

Holders of land may not get an injunction in a federal court to restrain the levy or enforcement of taxes on agricultural land, required by the Constitution and laws of a State.

Tuttle v. Bell, 377 Ill. 510, 37 N.E. (2d) 180.
Certiorari denied, 315 U. S. 815.

The law governing such an injunction by those who fail, [13] neglect or refuse to pay taxes mandatory under the same State law which governs the powers and duties of petitioner in the instant case, was construed in *Wores v. Imperial I.D.*, 227 Pac. 181, by the Supreme Court of California, and has not been modified by any subsequent case. See also, *Tulare I.D. v. Shepherd*, 185 U. S. 1.

When the highest court of a State has ruled on the rights in property under control of a trustee (Petitioner here is a trustee, a statutory public trust) the Bankruptcy Court is bound by the decree of the State Court. *Ohio Oil Co. v. Thompson*, 120 F. (2d) 831.

All property of an Irrigation District, including property in land revested for non-payment of taxes, is held in trust for the uses and purposes of the

Act, which includes the fulfillment of all lawful obligations, and such land is immune from prescription.

Civil Code of California, § 1007.

Proceedings for composition of obligations demand the utmost in good faith by the bankrupt.

Boas v. Bank of America, 51 C.A. (2d) 592.

No claim appears, nor could be validly made, that the removal of the injunctive provisions in the proposed final decree would or could adversely affect any right belonging to or claimed by the petitioner here, or by any other party holding a valid claim.

That the injunction proposed would have one effect, and one only if not stricken, which is that it would constitute an order arresting the execution of valid, and irrepealable land tax statutes, in full force and effect (now codified in the Water Code, Stat. 1943, Ch. 368, Div. 10, 11, Sections 20,000 to 27,758, especially sections 25,200 to 26,553), and would thus result in exonerating petitioner from performing [14] its constitutional and statutory taxing duties.

The testimony of J. Bowers Campbell, counsel for the R.F.C. published in the Hearings dated May 24, 1946, on H.R. 4307, "A Bill to amend Sections 81, 82, 83, 84 of Chapter IX of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, as amended," subsequently amended, reintroduced and reported as H.R. 6682, is as follows (p. 17):

Mr. Campbell . . . I have been a member of the committee for a number of years, and was a member at the time that this bill was prepared.

I agree with the statements of Mr. Parkhurst regarding the notice to landowners for the reason that these proceedings are instituted for the benefit of the landowners. They are the only parties who are taxed and are the only ones who receive benefits from the proceedings. (Emphasis ours.)

(Committee on the Judiciary, House of Rep.,
79 Congress 2d Session.)

The Court may take judicial notice of the effect of abrogating the land taxes within the districts the bonds of which have been surrendered by their holders at a sacrifice figure, or to the Federal Courts in the belief that they had no alternative, or for other reasons deemed sufficient by them. The ceiling thus created on the annual tax rate, by the reduced fixed obligations after the original bonds had been gotten in, at a fraction of their face value, has opened a veritable "Paradise" for speculation in the title deeds to land, thus freed from its ad-valorem taxes.

The unearned increment thus allowed the private holders of title deed to land so greatly freed from its former taxation, equals, if it has not exceeded the losses taken by the former holders of bonds of the district, in every district, including Paradise Irrigation District.

The inconsistency for Congress to create rent ceilings, as a brake on inflation, and at the same time to destroy [15] state rent ceilings to enrich the same economic interests now curbed by the Office of Price Administration (i.e., the private appropriators of rent), is evident.

That no private holder of land is legally entitled to such a windfall, when his claims clash with those of a bondholder, even if the holder of only one bond, has been settled by the Courts, both federal and state. The following cases are but a few.

Fallbrook v. Bradley, 164 U. S. 112;

Herring v. Modesto, 95 F. 705;

Fallbrook v. Cowan, 131 F. (2d) 513 (Certiorari denied);

Selby v. Oakdale, 140 C.A. 171 (Hearing denied by Cal. Sup. Ct.);

Shouse v. Quinley, 3 Cal. (2d) 357;

Provident v. Zumwalt, 12 Cal. (2d) 365;

Anderson Cottonwood I.D. v. Klukkert, 13 Cal. (2d) 191;

Meyerfeld v. South San Joaquin Irr. Dist., 3 Cal. (2d) 409;

Anderson Cottonwood I.D. v. Zinzer, 51 Cal. App. (2d) 582 (Hearing denied by Calif. Supreme Court, June 25, 1942).

“A municipality holds title to property acquired for unpaid taxes in trust for the benefit of bondholders and other creditors of the District.”

State v. Stacey, 116 Pac. (2d) 356 (Wn. Sup. Ct.).

“Evading creditors is not a contemplated activity of a public district, whose bonds are recognized investments for financial institutions. Among other purposes of the act, therefore, is the repayment of the bondholders of the district, and it follows that this is one of the purposes of which the trust money is held. . . .

The land is the ultimate and only source of payment of the bond. It can never be permanently released from the obligation of the bonds until they are paid. (Emphasis ours.)

Provident v. Zumwalt, 12 Cal. (2d) 365.

The injunctive language in the proposed final decree, if allowed, is intended to have the force and effect of unlawfully enriching land-title holders, and has no warrant under any law. Such an injunction is prohibited by U.S.C. 28, § 41(1), sub. (3), and other federal statutes cited above.

Arkansas Corp. v. Thompson, 312 U. S. 673,
313 U. S. 132.

3.

The undersigned creditor, whose claim is on file in this court, holds valid, binding and unpaid original 6% gold bonds of the petitioner, and duly

registered coupons the [16] payment of which has been unlawfully refused for many years.

(*Selby v. Oakdale*, *supra*.)

Most of the bonds are not due or payable, and none are subject to call or redemption before their fixed maturities, even at 100 and accrued interest at 6% to date of maturity of the bond.

These bonds are not contracts between private interests but are in fact, state land-tax and rent anticipation trust obligations backed by the irrevocable tax statutes pursuant to which the money was borrowed by petitioner, the force and effect of which have been clearly and unequivocally settled in the cases cited above.

“Especial care should be had to such decisions when the dispute arises out of the general laws of a State, regulating its exercise of the taxing power, or relating to the State’s disposition of its public lands.”

Wilson v. Standifer, 184 U. S. 399, 412.

“When the highest court of a State, in an appropriate action, has decided that taxes were properly assessed, and are legal and valid under the Constitution and laws of the State, a federal court will not entertain a suit to enjoin their collection.”

Douglas County v. Stone, 191 U. S. 337.

“The levying of State taxes upon the title of private landholders . . . impairs the exercise of no federal function.” (Emphasis ours.)

Petition of S.R.A. v. Minnesota, 18 N.W. (2d) 442. Affirmed by U. S. Supreme Ct., in S.R.A. v. Minn., 14 L.W. 4269.

For the reasons and on the authority of the cases cited, J. R. Mason objects to any and all other provisions in the proposed final decree which do or may be in violation of his vested rights, as a bondholder, which rights are secured by Art. 1, Section 16; Art. 6, Sec. 13; Art. 4, Sec. 25, Sub. 16; Art. 4, Sec. 31 of the California Constitution, and Art. 1, Sec. 10, cl. 1, and the Fifth, Eleventh, Fourteenth [17] and Sixteenth Amendments to the Constitution of the United States of America.

Dated November 27, 1946.

/s/ J. R. MASON,

A creditor, in Pro Se.

1920 Lake Street,
San Francisco 21, Cal.

[Endorsed]: Filed Nov. 29, 1946. C. W. Calbreath, Clerk. [18]

[Letterhead Peters & Peters]

December 2, 1946

Mr. C. W. Calbreath
Clerk of the Federal Court
Sacramento, California

Re: No. 7703, Paradise
Irrigation District.

Dear Sir:

In the above matter, we have received objections to the proposed Final Decree in the above matter. This undoubtedly is served in pursuance of the District's notice to either approve or disapprove the decree as to form.

The proposed objections to the decree do more than approve or disapprove; the Court, in its interlocutory decree ordered the issuance of a final decree and everything is in readiness for such decree.

In the matter, I do not see the need for a hearing, but would appreciate advice as to what the Court deems proper.

Yours very truly,

PETERS & PETERS,
JEROME D. PETERS.

JDP:drb-

cc: H. S. Clewett

Attorney at Law
Paradise, California

Lilliam Compton, Secretary
Paradise, California. [19]

[Title of Court and Cause.]

BRIEF OF PARADISE IRRIGATION
DISTRICT

The brief of J. R. Mason, respondent, has been received.

The writer is not replying to the brief directly, inasmuch as it is completely and wholly beside the point in question and the legal matter involved, namely, the form of the decree.

This case was first tried in the District Court, then appealed by Mr. Mason to the Circuit Court of Appeals, which Court sent it back to the District Court for a further hearing on one matter, namely, the ability of the district to pay under the circumstances. The matter was again tried by the District Court, the decision being in favor of the district. Mr. Mason then appealed to the Circuit Court. There the decision of the District Court was upheld, and Mr. Mason petitioned the United States Supreme Court for a Writ of Certiorari. A Writ of Certiorari was granted by the Supreme Court and the matter was heard and the Supreme Court upheld the decisions of the Appellate and District Courts, which was in favor of the district. Thereupon, Mr. Mason petitioned the United States Supreme court for a rehearing, which was denied. This ended the matter.

For the original decision of the United States Supreme Court, see: [20]

Mason v. Paradise Irrigation District, 326
U. S. 566, 66 S. Ct. 290.

For the denial of the petition by the United States Supreme Court for a rehearing, see

Mason v. Paradise Irrigation District, 327
U. S. 813, 66 S. Ct. 519.

The matter being ended, the district presented to this court its proposed form of final decree, which is in conformation with the decisions of the United States Supreme Court, Circuit Court of Appeals and the District Court. Under the rules governing procedure of the Supreme Court, notice of the presentation of the proposed final decree was given Mr. Mason and under the rules, he had certain time to propose objections "to the form of the proposed decree." Instead of proposing objections to the form of the decree, Mr. Mason proposed objections seeking to try the case all over again and start out where we started out in 1937, almost ten years ago.

The decision of the Supreme Court is final and conclusive. We respectfully submit that the objections of Mr. Mason be overruled, and the decree signed and filed.

Dated May 24, 1947.

Respectfully submitted,

H. S. CLEWETT,

PETERS & PETERS,

By JEROME D. PETERS,

Attorneys for Paradise
Irrigation District.

[Endorsed]: Filed May 27, 1947. [21]

[Title of Court and Cause.]

REPLY BRIEF OF J. R. MASON

The Brief of Paradise Irrigation District, Petitioner, has been received.

The points objected to in the "Objections to proposed Final Decree" filed with this Court Nov. 27, 1946, were not before the U. S. Supreme Court in the case of *Mason v. Paradise I.D.*, 326 U. S. 566.

Petitioner has cited no decision by the U. S. Supreme Court, under a Chap. IX proceeding which supports his argument, or which reverses the principles of constitutional law steadfastly adhered to by the Supreme Courts of the U. S., and of California in the cases cited by respondent. The bald contention that the proposed final decree "is in conformation with the decisions of the U. S. Supreme Court," without any supporting citations, is mere wishful hoping.

It is respectfully submitted that the proposed Final Decree be not signed or filed.

Dated May 28, 1947.

Respectfully submitted,

J. R. MASON,

Respondent in Pro se.

1920 Lake Street

San Francisco 21, Calif.

[Endorsed]: Filed May 29, 1947. C. W. Calbreath, Clerk. [22]

[Title of Court and Cause.]

FINAL DECREE

This Cause came on before me this day to be heard upon the application of petitioning district for an order finally discharging it from all liability for and decreeing the cancellation and annulment of its outstanding old obligations affected by and refinanced pursuant to its plan of composition heretofore approved by this Court, and upon the written report filed with the Clerk of this Court by Bank of America National Trust and Savings Association, the Disbursing Agent heretofore appointed in this cause, and the Court having seen and examined the application and report and the evidence offered in support thereof, and being fully advised in the premises, finds:

(1) That the petition for composition of indebtedness filed in this cause by the petitioning district and the acceptance and approval thereof by holders of more than fifty-one per centum (51%) of its outstanding indebtedness were, in all things, in compliance with law and have been duly approved by this Court; and

(2) That the offer or plan of composition as set forth in the petition filed in this cause was duly accepted in writing and approved by the holders of more than sixty-six and two-thirds per centum ($66\frac{2}{3}\%$) of its outstanding indebtedness affected thereby; was proposed and accepted in good faith; is fair, equitable and just; [23] was to the best

interests of and does not discriminate unfairly in favor of any creditor or class of creditors, and has been duly approved by this Court; and

(3) That in order to raise the funds with which to fully consummate its plan of composition, the petitioning district, with the approval of this Court, has issued and sold its new serial bonds to the Reconstruction Finance Corporation, an agency of the United States Government, in the principal sum of \$252,500, all dated October 1, 1934, bearing interest from date until paid at the rate of four per centum (4%) per annum, payable semiannually, and evidenced by interest coupons thereto attached, the numbers, principal amount and maturity dates thereof being as follows:

Due Dates	Numbers		Total Principal
	\$1000	\$500	
Jan. 1, 1938	1 to 4	5.....	\$ 4500.00
Jan. 1, 1939	6 to 8	10.....	4500.00
Jan. 1, 1940	11 to 15	.....	5000.00
Jan. 1, 1941	16 to 20	.....	5000.00
Jan. 1, 1942	21 to 25	26.....	5500.00
Jan. 1, 1943	27 to 31	32.....	5500.00
Jan. 1, 1944	33 to 37	38.....	5500.00
Jan. 1, 1945	39 to 44	.....	6000.00
Jan. 1, 1946	45 to 50	.....	6000.00
Jan. 1, 1947	51 to 56	57.....	6000.00
Jan. 1, 1948	58 to 63	64.....	6500.00
Jan. 1, 1949	65 to 71	.....	7000.00
Jan. 1, 1950	72 to 78	.....	7500.00
Jan. 1, 1951	80 to 86	87.....	7500.00
Jan. 1, 1952	88 to 95	.....	8000.00
Jan. 1, 1953	96 to 103	.....	8000.00
Jan. 1, 1954	104 to 111	112.....	8500.00
Jan. 1, 1955	113 to 121	.....	9000.00

Due Dates	Numbers		Total Principal
	\$1000	\$500	
Jan. 1, 1956	122 to 130	.....	\$ 9000.00
Jan. 1, 1957	131 to 139	140.....	9500.00
Jan. 1, 1958	141 to 150	.....	10,000.00
Jan. 1, 1959	151 to 160	.....	10,000.00
Jan. 1, 1960	161 to 170	171.....	10,500.00
Jan. 1, 1961	172 to 182	.....	11,000.00
Jan. 1, 1962	183 to 193	194.....	11,500.00
Jan. 1, 1963	195 to 206	.....	12,000.00
Jan. 1, 1964	207 to 218	219.....	12,500.00
Jan. 1, 1965	220 to 232	.....	13,000.00
Jan. 1, 1966	233 to 245	246.....	13,500.00
Jan. 1, 1967	247 to 260	.....	14,000.00
			<hr/>
			\$252,500.00

and that so far as these proceedings are concerned, the new bonds are valid and enforceable obligations of the petitioning district; and

(4) That prior to the issuance and sale of the new bonds mentioned last above, the Reconstruction Finance Corporation, with the approval of this Court and in accordance with the plan of composition, has purchased certain of the outstanding old obligations of the petitioning district, to wit: Bonds of the district in the principal sum of Four Hundred Forty-seven Thousand (\$447,000.00) Dollars which were later cancelled and delivered to the petitioning district in exchange for its new bonds equal to the amount paid for the old bonds or obligations so purchased, plus four per centum (4%) interest thereon to the date of exchange; and

(5) That from the proceeds received by the petitioning district from the sale of its new bonds to the Reconstruction Finance Corporation, the sum

of Fifteen Thousand Two Hundred Thirty-one and 09/100 (\$15,231.09) Dollars was turned over to the Disbursing Agent who, pursuant to the orders of this Court and the plan of composition approved in this cause, has disbursed none thereof for the purpose of taking up and refinancing certain outstanding old obligations of the district or at all; that the Disbursing Agent has filed in this cause its written report fully showing the amounts received and disbursed by it, the latter being no sum whatever, including the payment into the registry of this Court of the sum of Fifteen Thousand Two Hundred Thirty-one and 09/100 (\$15,231.09) Dollars, being the [25] amount remaining in his hands on the 14th day of November, 1946; and that the report and the receipts and disbursements certified to therein should be confirmed and approved, and the Disbursing Agent discharged from further duties and liabilities as such; and

(6) That the plan of composition is binding upon all creditors affected by it, whether secured or unsecured, and whether or not their claims have been filed or evidenced, and, if filed or evidenced, whether or not allowed, including creditors who have not, as well as those who have, accepted it; and that petitioner has made available for the creditors affected by the plan the consideration provided for therein and should be discharged from all debts and liabilities dealt with in the plan, except as provided therein; and

(7) That all costs, expenses, fees and other charges properly chargeable to the petitioning district in this cause, have been duly approved and paid.

It Is Therefore Ordered, Adjudged and Decreed as follows:

(a) That the receipts and disbursements by, and the other official acts of Bank of America National Trust and Savings Association, Disbursing Agent, as set forth and certified to in its report filed in this cause, be and the same are hereby approved and confirmed, and that his duties as Disbursing Agent be terminated and his liabilities thereunder be forever discharged; and

(b) That the sum of Fifteen Thousand Two Hundred Thirty-one and 09/100 (\$15,231.09) Dollars, paid into the registry of this Court by the Disbursing Agent, be disbursed by the Registrar for the purpose of taking up and retiring and refinancing, in accordance with the plan [26] of composition approved in this cause, such remaining outstanding old obligations of the petitioning district as are affected by the plan of composition, and which may be presented to the Registrar for that purpose within the period of twelve months from the date of this final decree becomes final; that all such obligations so presented and paid for, be forthwith cancelled and returned to the petitioning district by the Registrar; that all such outstanding old obligations of the petitioning district which are not so presented to the Registrar within said period of

twelve months shall thereafter be forever barred from participating in the plan of composition or in the funds held in the registry of this Court; that upon the expiration of the said period of twelve months, the Clerk of this Court shall forthwith notify the Reconstruction Finance Corporation, by registered letter addressed to it at Washington, D. C., of the amount of funds then remaining in the registry of the Court, and that the same are available for the purchase of new bonds of the petitioning district then held by the Reconstruction Finance Corporation, at par and accrued interest; that any new bonds so purchased shall be forthwith cancelled and returned to the petitioning district by the Registrar; that any part of such funds which are not used for such purpose within sixty days from the date of mailing of such notice, shall thereupon be paid by the Registrar of this Court to and used solely by the petitioning district in the payment of its new bonds and interest thereon; and

(c) That all the old bonds and other obligations of the petitioning district affected by the plan of composition approved in this cause, whether heretofore surrendered and cancelled or remaining outstanding, and by whomsoever held, are hereby cancelled, annulled and held for naught as enforceable obligations of the petitioning district, except as herein provided, and that the holders thereof be and they are hereby forever restrained and enjoined from otherwise asserting any claim or demand whatsoever therefor as against the petition-

ing district or its officers, or against the property situated therein or the owners thereof; and

(d) That the new or refunding bonds issued and sold by the petitioning district to the Reconstruction Finance Corporation and the collection of the principal and interest thereon, shall not in any wise be adversely affected by these proceedings, or by any order, judgment or decree entered or rendered in this cause; and

(e) That all proceedings necessary for fully affecting the plan of composition contemplated by this action, except the ministerial duties of the Registrar of this Court as provided herein, have been done and performed in accordance with law, and that all and singular orders, judgments and decrees heretofore entered and rendered in this cause, be and the same are hereby ratified and confirmed.

Done at Sacramento, California, on this the 24th day of September, 1947.

DAL M. LEMMON,
Judge.

[Endorsed]: Filed Sept. 24, 1947. C. W. Calbreath, Clerk. [28]

[Title of Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that J. R. Mason, a creditor of Paradise Irrigation District owning and

holding original 6% bonds issued by said District, does appeal to the Circuit Court of Appeals of the United States in and for the Ninth Circuit from the Final Decree entered in this proceeding September 24, 1947, and from the whole thereof.

Dated, San Francisco, California, October 21, 1947.

/s/ J. R. MASON,

A creditor, Pro Se.

Address, 1920 Lake Street, San Francisco 21, Calif.

[Endorsed]: Filed Oct. 21, 1947. C. W. Calbreath, Clerk. [29]

[Title of Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The final decree, as applied, is ultra vires the Congress.

2. The decree, as applied, conflicts with California laws which control the duties and obligations of the debtor.

3. The decree, as applied, contravenes the land laws of California controlling the rents, issues and profits of land within its domain.

4. The decree, as applied, impairs vested property rights of bondholders in violation of the 5th Amendment of U. S. Constitution.

5. The decree, as applied to the still outstanding original bonds, impairs a contract and trust obliga-

tion executed by the State of California, and secured by Art. 1, sec. 10, cl. 1 of U. S. Constitution, and by Art. 1, sec. 16 and Art. 6, sec. 13 of California Constitution.

6. The decree limiting acceptance of the funds in custodia legis to 12 months is an error of law.

7. The injunctive provisions in the final decree, as applied, are an error of law, and a gift of public funds prohibited by Art. IV, sec. 31 of the California Constitution.

8. The decree, which provides full payment of the investment made by the RFC in the form of long term interest bearing bonds, but denies equal treatment to the lawful [30] holder of valid, binding and unpaid original 6% gold bond obligations, ordering him to get a compromise cash figure without interest, is discriminatory, and unfair, and is an error of law.

J. R. MASON,

A creditor, Pro Se.

1920 Lake Street, San Francisco 21, California.

October 21, 1947.

[Endorsed]: Filed Oct. 21, 1947. C. W. Calbreath, Clerk. [31]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Appellant designates the following as those parts of the record on appeal as necessary for the consideration of the points upon which he intends to rely in this appeal:

1. All that portion of the record in this cause which was transmitted by the Clerk of this Court to the Clerk of the Circuit Court of Appeals for the Ninth Circuit and printed by said Clerk in the case of the appeal entitled: "J. R. Mason v. Paradise Irrigation District, No. 9925, in the United States Circuit Court of Appeals for the Ninth Circuit."

2. The mandate of said Court.

3. Petition for Final Decree.

4. Objections to Proposed Final Decree, dated Nov. 27, 1946.

5. Brief of J. R. Mason, dated May 1947.

6. Final Decree.

7. Notice of appeal.

8. Statement of points on appeal.

9. This designation and any stipulations and orders made subsequent hereto.

Dated October 21, 1947.

J. R. MASON,

A creditor, Pro Se.

[Endorsed]: Filed Oct. 21, 1947. C. W. Calbreath, Clerk. [32]

[Title of Court and Cause.]

DESIGNATION OF ADDITIONAL CONTENTS
OF RECORD ON APPEAL

Appellant designates the following as additional parts of the record on appeal as necessary for the presentation of appellee's case.

1. Letter of Peters & Peters to Mr. C. W. Calbreath, Clerk of the Federal Court, Sacramento, California, dated December 2, 1946.

2. Brief of Paradise Irrigation District, dated May 24, 1947.

3. Report of Disbursing Agent filed on or about September 25, 1946.

4. Entry in the office of the clerk for the deposit of the sum of Fifteen Thousand Two Hundred Thirty-one and 09/100 (\$15,231.09) Dollars to be paid to appellee upon presentation of his bonds.

Dated October 30, 1947.

PETERS & PETERS,
Attorneys for Appellee.

[Endorsed]: Filed Oct. 31, 1947. C. W. Calbreath, Clerk. [33]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 33 pages, numbered from 1 to 33, inclusive, contain a full, true and correct transcript of certain records, and proceedings in the matter of the Paradise Irrigation District, No. 7703, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation and Counter-designation of Portions of the Record to be contained in the Record on Appeal, copies of which are embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the sum of Thirteen and 20/100 (\$13.20), and that the same has been paid to me by the appellant herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 8th day of November, A.D. 1947.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ F. M. LAMPERT,
Deputy Clerk. [34]

[Endorsed]: No. 11779. United States Circuit Court of Appeals for the Ninth Circuit. J. R. Mason, Appellant, vs. Paradise Irrigation District, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed November 10, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,779

J. R. MASON,

Appellant,

vs.

PARADISE IRRIGATION DISTRICT,

Appellee.

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Appellant designates the following as those parts of the record on appeal as necessary for the consideration of the points on which he intends to rely in this appeal.

1. All that portion of the record which was transmitted by the Clerk of the District Court

to the Clerk of this Court in the case of the appeal entitled: "J. R. Mason v. Paradise Irrigation District, No. 9925 in the United States Circuit Court of Appeals for the Ninth Circuit."

2. The mandate of said Court.
3. Petition for Final Decree.
4. Objections to proposed Final Decree, dated Nov. 27, 1946.
5. Final Decree.
6. Notice of Appeal.
7. Statement of Points on Appeal.
8. This designation and any stipulations and orders made subsequent hereto.

Dated, San Francisco, California, November 20, 1947.

/s/ J. R. MASON,
A Creditor, Pro. Se.

1920 Lake Street.

[Endorsed]: Filed Nov. 19, 1947.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant hereby designates as the Statement of Points on which he intends to rely in this Appeal the "Statement of Points on Appeal" which is included in the Transcript of Record prepared by the Clerk of the U. S. District Court filed herein on or about Nov. 11, 1947.

Dated November 20, 1947.

/s/ J. R. MASON,
Appellant Pro Se.

[Endorsed]: Filed Nov. 19, 1947.

[Title of Circuit Court of Appeals and Cause.]

State of California,
City and County of San Francisco—ss.

J. R. Mason, being duly sworn, says:

That he is the Appellant in this cause; that he has designated as a portion of the Record on Appeal the printed Record on Appeal which was docketed in the Circuit Court of Appeals for the Ninth Circuit in the case of "J. R. Mason v. Paradise Irrigation District, No. 9925," and it appears that it should be unnecessary to reprint the said Record on Appeal or that it should be recopied, certified again by the Clerk of the United States District

Court from which this appeal originates, and reprinted, and it will be possible to produce at least four copies of the said Transcript of Record including those which may be already on file in said United States Circuit Court of Appeals and for these reasons appellant requests that an order be made ex parte providing for the use of the Transcript of Record in said cause No. 9925 as a part of the Record on Appeal herein, and dispensing with the necessity of printing the same upon the filing of four copies of said Transcript of Record including such copies as may be on file with the Clerk of the said U. S. Circuit Court of Appeals.

/s/ J. R. MASON,
Appellant, Pro Se.

Subscribed and sworn to before me this 25th day of November, 1947.

[Seal] /s/ VIOLET NEUENBURG,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 3, 1951.

It is so ordered.

Dated November 26, 1947.

/s/ FRANCIS A. GARRECHT,
Judge, U. S. Circuit
Court of Appeals.

[Endorsed]: Filed Nov. 25, 1947.

No. 11,779

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. MASON,

Appellant,

vs.

PARADISE IRRIGATION DISTRICT,

Appellee.

APPELLANT'S OPENING BRIEF.

J. R. MASON,

1920 Lake Street, San Francisco, California,

Appellant, Pro se.

FILED

APR 13 1948

PAUL T. CARRIE,

CLERK

INDEX

	Page
Jurisdictional facts and pleadings	1
Propriety of this appeal	3
Statement of the case	3
Specifications of error	5
Argument	6
First Proposition: The final decree, as applied, is ultra vires the Congress	6
Second Proposition: The decree, as applied, conflicts with California laws which control the duties and obligations of the debtor	10
Third Proposition: The decree, as applied, contravenes the land laws of California, controlling the rents, issues and profits of land within its domain	15
Fourth Proposition: The decree, as applied, impairs vested rights of appellant in violation of the 5th Amendment to the U. S. Constitution	17
Fifth Proposition: The decree, as applied to the still out- standing original bonds impairs a contract and trust obligation executed by the State of California and se- cured by Art. I, Sec. 10, Cl. 1 of U. S. Constitution, and by Art. I, Sec. 16 and Art. XIII, Sec. 6 of California Constitution	19
Sixth Proposition: The decree limiting the time within which to claim the funds in custodia legis to 12 months is an error of law	21
Seventh Proposition: The injunctive provisions in the final decree as applied, are an error of law, and a gift of public funds prohibited by Art. IV, Sec. 31 of the Cali- fornia Constitution	22
Eighth Proposition: The decree, which gives long term 4% bonds to one creditor, but denies equal treatment to appellant's claim is unfair	24
Ninth Proposition: The discharge, as applied, conflicts with the denial of discharge from the same debts, and which is res judicata	26
Summary	28

CITATIONS

Cases:	Pages
<i>Arkansas Corp. v. Thompson</i> , 312 U.S. 673, 313 U.S. 132	7
<i>Bankers Tr. Co. v. N. Y.</i> , 323 U.S. 714	17
<i>Biddle v. Oaks</i> , 59 Cal. 94	13
<i>Bd. of Directors v. Tregea</i> , 88 Cal. 334	14
<i>Bd. of Sup. v. Thompson</i> , 122 Fed. 860	14
<i>Board of Trustees Lethbridge Northern Irrigation District v. I. O. F.</i> , 2 L.L.R. 273	21
<i>Boone v. Kingsbury</i> (1928), 206 Cal. 148	9
<i>Cargile v. N. Y. Tr. Co.</i> , 67 F. (2d) 585	20
<i>Catholic Order of Foresters v. State of North Dakota</i> , 67 N. D. 228, 271 N. W. 670	30
<i>Chicot Co. Dr. Dist. v. Baxter State Bank</i> , 308 U.S. 371.....	27, 28
<i>City of Long Beach v. Morse</i> , 31 Adv. Cal. 283.....	9, 11
<i>County of Los Angeles v. Rockhold</i> , 3 Cal. (2d) 192....	19
<i>Faitoute I. & S. Co. v. City of Asbury Park</i> , 316 U.S. 502.....	8
<i>Fallbrook I. D. v. Bradley</i> , 164 U.S. 112.....	14
<i>Fallbrook v. Cowan</i> , 131 F. (2d) 513	18
<i>Farmers, etc., Bank v. Board</i> , 97 Cal. 318	14
<i>Gardner v. State of N. J.</i> , 329 U.S. 565	7
<i>Great Lakes Dredge and Dock Co. v. Huffman</i> , 319 U.S. 293	7
<i>Green v. City of Stuart</i> , 135 F. (2d) 33 (12 U.S. L.W. 3161).....	8
<i>Heinie v. Levee Comm.</i> , 19 Wall. 655	7
<i>Herring v. Modesto I. D.</i> , 95 Fed. 705	14
<i>Huddleson v. Dwyer</i> , 322 U.S. 232	7
<i>In re Spotlight Mfg. Co.</i> , 75 F. Supp. 458.....	16
<i>In re Valade Ref. Mfg. Co. v. City of Detroit</i> , 75 F. Supp. 443 (Mich.)	16
<i>J. R. Mason v. Paradise I. D.</i> , 326 U.S. 536.....	3, 12, 24
<i>Kohl v. U. S.</i> , 91 U.S. 374.....	10
<i>Louisville Jt. Stock Land Bank v. Radford</i> , 55 S. Ct. 854.....	18
<i>Lyford v. State of New York</i> , 137 F. (2d) 782.....	16
<i>Meredith v. City of Winterhaven</i> , 320 U.S. 228.....	7
<i>Meyerfeld v. S. San Joaquin I. D.</i> , 3 Cal. (2d) 409....	14
<i>Mission School Dist. v. Texas</i> , 116 F. (2d) 175.....	8
<i>Moody v. Provident I. D.</i> , 12 Cal. (2d) 389	14, 16, 22, 24

Cases—Continued

	Pages
<i>Morningstar v. Lafayette Hotel Co.</i> (1914), 211 N.Y. 465	29
<i>Nashville C. & St. L. RR. Co. v. Walters</i> , 294 U.S. 405	28
<i>Ohio Life Ins. Co. v. Debolt</i> , 16 How. 415.....	7
<i>Ohio Oil Co. v. Thompson</i> , 120 F. (2d) 831.....	11
<i>Ontario Land Co. v. Yordy</i> , 212 U.S. 152	7
<i>Oyama v. Cal.</i> , Case No. 44 (Jan. 19, 1948).....	15
<i>Petition of Schwarz</i> , 61 N.Y.S. (2d) 578	20
<i>Plourde v. Roy</i> , 1 D.L.R. 426	21
<i>Provident v. Zumwalt</i> , 12 Cal. (2d) 365 (1938).....	
.....9, 11, 12, 13, 14, 16, 20, 22	
<i>Reference re Debt Adj. Act, 1937</i> , 1 D.L.R. 1.....	21
<i>Rialto I. D. v. Stowell</i> , 246 Fed. 294	14
<i>Security 1st Nat. Bank v. Rindge L. & N. Co.</i> , 85 F. (2d) 557, cert. denied 299 U.S. 613.....	20
<i>Selby v. Oakdale I. D.</i> , 140 C. A. 171.....5, 8, 12, 13, 14, 19	
<i>Shepherd v. McDonald</i> , 157 Fed. (2d) 467	27
<i>Shouse v. Quinley</i> , 3 Cal. (2d) 357	8, 13, 14, 19
<i>Skaggs v. Comm.</i> , 122 F. (2d) 721, cert. denied 315 U.S. 810	16
<i>Spellings v. Dewey</i> , 122 F. (2d) 652.....	8, 22
<i>Toucey v. N. Y. Life Ins. Co.</i> , 314 U.S. 119	23
<i>U. S. v. Bekins</i> , 304 U.S. 27	7, 23
<i>U. S. v. Carmack</i> , 67 S. Ct. 252	10
<i>Wood v. Lovett</i> , 313 U.S. 362	20

Codes:

Bankruptcy Act, Sections 24 and 25	3
Bankruptcy Act, Section 52	5, 12
Bankruptcy Act, Section 64, sub. a	15
Bankruptcy Act, Section 148	15
Civil Code of Cal., Section 1007.....	14
Judicial Code, Sections 851-852, Title 28	21
Rev. & Tax. Code, Section 532	14
Rev. St., Section 3224	15
28 USC Section 41(1), subs. 3, 4	15
11 USCA Sections 47-48	3
11 USCA Section 104, sub. a	15
11 USCA Section 107, subs. b, c	15
11 USCA Sections 401-403	4, 7, 8, 9, 21, 28
11 USCA Section 403, sub. d	26
11 USCA Section 548	15

Codes—Continued	Pages
26 USCA Section 1543, Rev. St. Section 3224	15, 18, 22
28 USCA Section 379	23, 24
40 USCA Section 258a	15

Statutes:

Stats. 1897, page 254	2
Stats. 1909, page 1075	4, 11
Stats. 1917, pages 765-768	4
Stats. 1917, page 758	8
Stats. 1917, page 764	3
Stats. 1919, page 667	5, 12
Stats. 1939, Chapter 72	9, 19
Stats. 1943, Chapter 368, Divisions 10, 11.....	2

Miscellaneous:

11 Am. Jur., Conflict of Laws, Section 30	16
California Constitution, Article I, Section 16	6, 19, 21
California Constitution, Article VI, Section 13	6, 19, 21
California Constitution, Article IV, Section 31	24
California Constitution, Article XIII, Section 6	6, 19, 21
4 Collier on Bankruptcy, 14th Ed., page 157.....	16
Comp. St. Section 9601 a, sub. (1)	16
43 Corp. Jur. page 211	9
Deering's General Laws, Act 3854, page 1792.....	2
Restatement of Conflict of Laws, Section 243	21
U. S. Constitution, Article I, Section 10, Clause 1....	6, 19, 21

No. 11,779

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. MASON,

Appellant,

vs.

PARADISE IRRIGATION DISTRICT,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL FACTS AND PLEADINGS.

This proceeding is under Chapter IX, 11 USCA §§ 401-403, 50 Stat. 653, as amended June 30, 1946.

Appellant owns and holds \$29,000 par value of Paradise Irrigation District original, unrefunded, valid, binding and unpaid 6% general obligation bonds, dated May 1, 1917 and July 1, 1920, with fixed serial maturities, with a present value of not less than \$50,000 (including statutory interest in default since 1936).

By the terms of the final decree appellant is given the choice of accepting \$15,231.09 for his claim providing he withdraws the funds in *custodia legis* within one year, or be forever enjoined from making any

claim whatsoever "against the petitioning district or its officers." (R. 31-32.)

This \$15,231.09 is less than the defaulted interest alone on the claim of appellant, leaving no compensation whatever for principal of the \$29,000 bonds.

Otherwise, the final decree provides that holders of original bonds "be and they are hereby forever restrained and enjoined from otherwise asserting any claim or demand whatsoever as against the petitioning district or its officers, or against the property situated therein or the owners thereof." (R. 31, 32.) Appellant filed his proof of claim, but did not and does not "submit himself to the jurisdiction of this Court except for the special purpose of objecting to the jurisdiction of this court." (R. 161-163; Case No. 9925.)¹

The claim of appellant, according to controlling decisions by the Supreme Courts of the United States and of California, is governed exclusively by State law, and is subject to no "interference" by virtue of any federal statute, including 11 USCA §§ 401-403. The State law creating and controlling the contractual obligation in appellant's bonds, is Stats. 1897, p. 254 as amended, Deering's General Laws, Act 3854, p. 1792. Codified in Stats. 1943, Ch. 368, Div. 10, 11 as the Water Code of California.

Final decree was entered Sept. 24, 1947. (R. 26.) Notice of appeal was filed Oct. 21, 1947. (R. 32.)

¹References are to the Record in Case No. 11,779 unless otherwise indicated. The Record in Case No. 9925 is a part of the Record on Appeal herein.

The jurisdiction of this Court is invoked under Sections 24 and 25 of the Bankruptcy Act of 1898 as amended June 22, 1938. (11 USCA Secs. 47-48.)

PROPRIETY OF THIS APPEAL.

Appellee insists that the *J. R. Mason v. Paradise I. D.*, 326 U.S. 536 opinion "ended the matter". (R. 23.) That case involved only one minor question, and nothing ordered or decreed in the interlocutory decree had the force or effect of impairing or destroying the claim of appellant, so it would have been premature to present the basic constitutional points raised herein, as an actual controversy before the final decree.

STATEMENT OF THE CASE.

Paradise Irrigation District is a trust of land, a public agency of California, situate in Butte County, and created in 1916, according to the provisions of Stats. 1897, p. 254, as amended, Deering's General Laws, Act 3854, p. 1792. Appellant's "bonds and the interest thereon shall be paid from an annual assessment upon the land within the district; and all the land within the district shall be and remain liable to be assessed for such payments as hereinafter provided." (Stats. 1917, p. 764.) "The legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district, and shall be held by such

district, in trust for, and is hereby dedicated and set apart to the uses and purposes set forth in this act. And said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property, as herein provided * * *". (Stats. 1909, p. 1075.) The law also imposed on county officials continuing duties to levy the assessments, and also on the Attorney General. (Stats. 1917, pp. 765/768.) The power of the State to establish such a trust of land and agency of the State is not questioned.

The first bond issue was voted and sold in 1917. A smaller issue was voted and sold in 1920. Of these two bond issues, the only bonds still outstanding are the twenty-nine bonds owned by appellant. (R. 154, Case No. 9925.)

Prior to the instant petition, appellee submitted the same plan of composition to get a discharge from the same claims owned by appellant. Discharge was disallowed under the provisions of Ch. IX of the Bankruptcy Act. (11 USCA 301-304.) Judgment of dismissal, which long ago became final, is shown. (R. 86/89, No. 9925.)

The subsequent payment to appellant of \$3,035.95 as interest on his claim (R. 157, No. 9925) was made out of Court, and is proof that appellee recognized the finality of the judgment of dismissal. (R. 89, No. 9925.) Since that payment in 1937, appellee has refused to pay appellant any of the interest or principal which has fallen due, but it has paid all interest and principal due the R.F.C. on account of the refunding

4% bond issue, in absolute violation of the applicable and controlling order of payment provisions in Sec. 52 (Stats. 1919, p. 667) as construed and applied in *Selby v. Oakdale I. D.*, 140 C. A. 171.

There is no complaint by the R.F.C., or by anyone that the holding of the original bonds does or could infringe their rights.

The objections presented to the final decree (R. 5/21) were not answered (R. 23) nor was any opinion issued before the District Court entered the final decree. (R. 26.)

SPECIFICATIONS OF ERROR.

Appellant relies upon the following specifications of error within the scope of the assignment of errors submitted in the Statement of Points on Appeal. (R. 33 and 40.)

1. The final decree, as applied, is *ultra vires* the Congress.

2. The decree, as applied, conflicts with California laws which control the duties and obligations of the debtor.

3. The decree, as applied, contravenes the land laws of California controlling the rents, issues and profits of land within its domain.

4. The decree, as applied, impairs vested property rights of bondholders in violation of the 5th Amendment of U. S. Constitution.

5. The decree, as applied to the still outstanding original bonds, impairs a contract and trust

obligation executed by the State of California, and secured by Art. I, Sec. 10, Cl. 1 of U. S. Constitution, and by Art. I, Sec. 16 and Art. VI, Sec. 13 of California Constitution.

6. The decree limiting acceptance of the funds in *custodia legis* to 12 months is an error of law.

7. The injunctive provisions in the final decree, as applied, are an error of law, and a gift of public funds prohibited by Art. IV, Sec. 31 of the California Constitution.

8. The decree, which provides full payment of the investment made by the R.F.C. in the form of long term (4%) interest bearing bonds, but denies equal treatment to the lawful holder of valid, binding and unpaid original 6% gold bond obligations, ordering him to get a compromise cash figure without interest, is discriminatory, and unfair and is an error of law.

ARGUMENT.

**FIRST PROPOSITION: THE FINAL DECREE, AS APPLIED,
IS ULTRA VIRES THE CONGRESS.**

The immunity of the bonds and other fiscal affairs of Paradise Irrigation District from federal control or interference, is based on the fact that appellant's bonds constitute a valid, binding and unpaid contract with the State of California, or its public agency, protected from federal impairment by the Federal Constitution.

The Supreme Court of the United States has not abandoned this basic principle of constitutional im-

munity, announced in *Ohio Life Ins. Co. v. Debolt*, 16 How. 415, as follows:

“* * * whether such contracts should be made or not, is exclusively for the consideration of the State. It is the exercise of an undoubted power of sovereignty which has not been surrendered by the adoption of the Constitution of the United States, and over which this Court has no control.”

Nothing in Ch. IX (11 USCA 401-403) of the Bankruptcy Act allows a Federal Court to veto or interfere in any manner with non-discriminatory land tax laws of a State. To allow Federal Courts to interfere with the levy and collection of direct *ad-valorem* land taxes or assessments required by State law and decisions would contravene a very long line of cases, including *Heinie v. Levee Comm.*, 19 Wall. 655; *Ontario Land Co. v. Yordy*, 212 U.S. 152; *Arkansas Corp. v. Thompson*, 312 U.S. 673, 313 U.S. 132; *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293; *Meredith v. City of Winterhaven*, 320 U.S. 228; *Huddleson v. Dwyer*, 322 U.S. 232; *Gardner v. State of N. J.*, 329 U.S. 565.

No such question was before the Supreme Court in the *U. S. v. Bekins* case, as an actual controversy, and that Court was very careful to warn that Chap. IX does not authorize a Court of Congress to “contravene provisions of the Federal Constitution”, as follows (304 U.S. 27, 52):

“The reservation to the States by the 10th amendment protected and did not destroy their right to make contracts and give consents *where that ac-*

tion would not contravene the provisions of the Federal Constitution." (Italics supplied.)

In *Faitoute I. & S. Co. v. City of Asbury Park*, 316 U.S. 502, 508, the Court said in regard to the force and effect of Ch. IX:

"It would offend the most settled habits in the relationship between the states and the nation to imply such a retroactive nullification of state authority over its subordinate organs of government."

In *Mission School Dist. v. Texas*, 116 F. (2d) 175 (C.C.A. 5), the Court very carefully pointed out that Congress, in enacting the amended Chap. IX (11 USCA 401-403) inserted "an express requirement that nothing shall be agreed on which the State law does not enable it to do." See also *Spellings v. Dewey*, 122 F. (2d) 652; see also, *Green v. City of Stuart*, 135 F. (2d) 33, cert. denied and rehearing denied (12 U.S. L.W. 3161, Nov. 9, 1943) as follows:

"Chap. IX is a special exercise of the bankruptcy jurisdiction, *is dependent on State consent and is limited to that consent.*" (Italics supplied.)

Paradise Irrigation District is a trust of land within the sovereign domain of California. It has no authority or standing to urge on behalf of taxpayers that taxes be curbed, nor with consent of some creditors that appellant's claim be dishonored. (Stats. 1917, p. 758.) The applicable State law allows neither *Selby v. Oakdale I. D.*, 140 C. A. 171; *Shouse v. Quinley*, 3 Cal. (2d) 357; *City of Long Beach v.*

Morse, 31 A.C. 283, 287, 295 (Dec. 30, 1947). "Nor are the grounds for the decision in *Provident Land Corp. v. Zumwalt* (1938), 12 Cal. (2d) 365 present here. Both the nature of the trust upon which the lands there concerned were granted for irrigation purposes and *the rights of the bondholder 'beneficiaries'* differ from those involved in this action." (Italics added.)

Although the bonds owned by appellant were issued in 1917 and 1920, it was not until 1939 (Stats. 1939, Ch. 72) that any California statute attempting to allow agencies of the State to submit to any Federal statute, including 11 USCA 401-403 existed.

In *Boone v. Kingsbury* (1928), 206 Cal. 148, at p. 189, the Court warned:

"The state cannot abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties * * *".

In 43 *Corp. Jur.* p. 211, it is stated:

"As the state may not, by any law or contract, surrender or restrict any portion of the sovereignty which it holds in sacred trust for the public weal, so a municipal corporation, as a governmental agency, can not surrender or contract away its governmental functions and powers, *nor such functions as are regarded as mandatory*, and any attempt to barter or surrender them is invalid." (Italics added.)

The Supreme Court has again reaffirmed that Federal powers can not be enlarged, when a state con-

sents. *U. S. v. Carmack*, 67 S. Ct. 252, at 255, quoting with approval from *Kohl v. U. S.*, 91 U.S. 374, as follows:

“If the U. S. have the power it must be complete in itself. It can neither be enlarged or diminished by a State. * * * The consent of a State can never be a condition precedent to its enjoyment.”

The above cited cases from other Circuits point out that the authority allowed by Congress to its Courts in Chap. IX proceedings is “dependent on State consent, and is limited to that consent”. In the *Bekins* case the Court was careful to point out that a State could not give an effective consent, unless “that action would not contravene the provisions of the Federal Constitution.”

Therefore, because the claim of appellant is a vested statutory right secured both by the Federal and California Constitutions, it is as immune from “interference” by Acts of the Congress, as other encumbrances or statutory liens on restricted land within the domain of California. Under controlling law and decisions it is immune from Federal veto or interference, because any attempt by the Congress to exercise its power in this field in conflict with State law, is *ultra vires*.

SECOND PROPOSITION: THE DECREE, AS APPLIED, CONFLICTS WITH CALIFORNIA LAWS WHICH CONTROL THE DUTIES AND OBLIGATIONS OF THE DEBTOR.

The land in each California Irrigation District “shall be held by such district, in trust for, and is

hereby dedicated and set apart to the uses and purposes set forth in this act.” (Stats. 1909, p. 1075.)

The right of appellant as a holder of contractual obligations to repayment from ground rent was clearly and unequivocally settled in the *Provident v. Zumwalt*, 12 Cal. (2d) 365 (1938) case:

“Once it is made clear that the lands are held in trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust. It would be manifestly absurd to say that although the property is held in trust, none of the benefits of the trust property accrue to the beneficiaries, and that none of the rents or profits of the trust property need be used in furtherance of the trust purposes. On this point, namely, that the land is trust property, held for the ‘uses and purposes’ of the act, and that the proceeds are stamped with the character of the property from which they flow, the statute read in the light of elementary principles, leaves no room for debate.”

This ruling was cited December 30, 1947 in the case of *City of Long Beach v. Morse*, 31 Adv. Cal. 283, at 287, when the California Supreme Court disallowed attempts by another State agency to misapply proceeds of such a trust of land.

In *Ohio Oil Co. v. Thompson*, 120 F. (2d) 831, it was adjudged that when a State Court has ruled on the rights of a trustee, the Bankruptcy Court is bound by the State Court decree.

The bonds owned by appellant constitute irrevocable contractual obligations payable at fixed maturity dates, or thereafter from assessments, water tolls, and

the proceeds of land sales or the rents, issues and profits of all land within the District as a beneficent landlord, until the contract is fully repaid, with interest as provided by the applicable law. The contract is created by statute, the bonds and coupons being merely evidences of the contract. Stats. 1939, Chap. 72 did not supersede any of the statutes applicable to the contract owned by this appellant. Appellee has shown no statute permitting Paradise Irrigation District to break its contract and trust obligation to appellant, and has made no reply to the objections made to the proposed final decree. (R. 5/25.)

In *Mason v. Paradise I. D.*, 326 U.S. 536, the only question before the Court was the point of equality between creditors. Nothing in the interlocutory decree could form the base for raising constitutional questions, as an actual controversy. Appellee argues that this opinion by the Supreme Court is equivalent to "The matter being ended." (R. 26.) Seemingly appellee has the notion that entry of an interlocutory decree in a Ch. IX proceeding entitles the debtor, as a matter of right to a discharge, to which no creditor may offer objections. Appellee for more than 10 years has disbursed its trust revenues in violation of the mandatory provisions in Sec. 52 (Stats. 1919, p. 667) as construed and applied in *Selby v. Oakdale I. D.*, supra, and *Provident L. C. v. Zumwalt*, supra and which cases are still controlling. All other bond claimants have been paid, although the bonds and coupons owned by appellant, which were duly and regularly presented for payment when due, have been unlawfully dishonored since 1937.

Appellee should assess the land within its boundaries as "escaped property" for the assessment years before 1948-1949 during which prior years the assessor had said property on his rolls but failed to assess the same at a rate sufficient to meet the principal and interest falling due on appellant's bonds, as required by the decisions in *Selby v. Oakdale I. D.*, supra; *Shouse v. Quinley*, supra; *Provident v. Zumwalt*, supra, which cases control the assessment duty of appellee.

The Record shows that beginning in 1933 all land within the District was assessed below the assessment levied in prior years, and the assessment was drastically cut again in 1934 and in all subsequent years. (R. 134, No. 9925; Exhibit "H".)

The refunding of original bonds, except those owned by appellant and one other bondholder was consummated in 1934. No assessment has since been made for the payment of appellant's bonds and interest as required by law, and thus all privately held land has escaped its lawful assessment since 1933.

For, as was said in *Biddle v. Oaks*, 59 Cal. 94, 96, "If any property subject to taxation should escape assessment in any year, the taxation for that year would not be equal and uniform, nor would all property in this State be taxed in proportion to its value, and the behest of the Constitution would not be obeyed * * * The Constitution does not favor the escape of any property from taxation, but positively requires that all property shall be taxed * * * And the exercise of this power (to assess escaped prop-

erty) is directly in accord with the policy and express provisions of the Constitution, which requires all property not exempt from taxation to be taxed. (Const., Art. XIII, sec. 1, *Farmers, etc., Bank v. Board*, 97 Cal. 318, 323.)

Although the Legislature has enacted a statute of limitations for the assessment of escaped personal property (Rev. & Tax Code, Sec. 532) no such limitation is applicable to escaped real property.

Real property within a California Irrigation District is made immune from title by prescription, by Civil Code of Cal., § 1007.

The "composition" offer of 52 cents is considerably less than the money now lawfully due as interest alone upon appellant's bonds, with nothing at all for bond principal.

The decisions controlling the rights and obligation of the parties are:

Fallbrook I. D. v. Bradley, 164 U.S. 112;

Herring v. Modesto I. D., 95 Fed. 705;

Bd. of Sup. v. Thompson, 122 Fed. 860;

Rialto I. D. v. Stowell, 246 Fed. 294;

Bd. of Directors v. Tregea, 88 Cal. 334;

Selby v. Oakdale I. D., *supra*;

Shouse v. Quinley, 3 Cal. (2d) 357;

Meyerfeld v. S. San Joaquin I. D., 3 Cal. (2d) 409;

Provident v. Zumwalt, *supra*;

Moody v. Provident I. D., 12 Cal. (2d) 389.

The final decree, as applied, is at variance with, and, if it stand, will have the force and effect of reversing

the above cases, and a very great many more, which it is submitted are *res adjudicata* and controlling of the point discussed in this proposition.

THIRD PROPOSITION: THE DECREE, AS APPLIED, CONTRAVENES THE LAND LAWS OF CALIFORNIA CONTROLLING THE RENTS, ISSUES AND PROFITS OF LAND WITHIN ITS DOMAIN.

In addition to the conflict discussed in the first two propositions, the final decree, as applied to appellant's claim conflicts with the following federal statutes and code provisions, which under recent and controlling decisions by the Supreme Court of the United States prevent the Courts of Congress issuing any order or decree having the force or effect of "interfering" with the orderly and lawful enforcement of the State's tax laws involving the acquisition, ownership, occupation, transferring and leasing of land within the State's domain, in the absence of complaint that such laws violate a right secured by the United States Constitution, as in *Oyama v. Cal.* case No. 44. (Jan. 19, 1948).

Bankruptcy Act §§ 64 sub. a;

11 U.S.C.A. §§ 104, sub. a;

11 U.S.C.A. §§ 107, subs. b, c;

28 U.S.C. § 41(1) subs. 3, 4;

Bankruptcy Act § 148;

11 U.S.C.A. § 548;

40 U.S.C.A. § 258a;

Rev. St. § 3224;

26 U.S.C.A. § 1543;

11 *Am. Jur., Conflict of Laws*, § 30;
Collier on Bankruptcy, 14th Ed., Vol. 4, page
 157;
 Sec. 17 (*Comp. St.* § 9601 a, sub. (1));
In re Valade Ref. Mfg. Co. v. City of Detroit,
 75 F. Supp. 443 (Mich.);
Skaggs v. Comm., 122 F. (2d) 721. Cert. denied
 315 U.S. 810.

Because the duty imposed on appellee to levy the assessment annually is a fixed and continuing duty created by the Constitution and laws of California until all valid claims, including the claim of appellant is fully paid, with interest, and because such future revenues are the fruits of the trust of land within Paradise Irrigation District, no court order that does not allow appellant, a *cestui que trust*, the full opportunity to receive such trust revenues, when, as and if collected by appellee, can be consistent with the vested statutory rights of appellant, in and to the rents, issues and profits of the restricted land within this district, as that right was construed and applied in *Provident v. Zumwalt* and *Moody v. Provident* cases, *supra*, by the Supreme Court of California.

That appellant is a *cestui que trust*, with a vested interest in and to such public revenues, can not change their character, and render them subject to federal interference. In *In re Spotlight Mfg. Co.*, 75 F. Supp. 458, New York city sales taxes were held immune from bankruptcy interference.

In *Lyford v. State of New York*, 137 F. (2d) 782 (C.C.A. 2) that Court first held that it could, in a

composition proceeding, interfere with future revenue payable as installments for a R. R. grade crossing. This ruling was reversed after rehearing and announced in 140 F. (2d) 840 as follows:

“Since the installments remain continuing obligations of this (R. R.) debtor and any successor in title, as they become due, no plan of reorganization can be feasible and hence acceptable which does not arrange for their payment and thus in substantial effect safeguard the ultimate interests of the State.”

Certiorari was denied in *Bankers Tr. Co. v. N. Y.*, 323 U.S. 714.

All the land within Paradise Irrigation District, together with its rents, issues and profits, is irrevocably dedicated a public trust, until all lawful obligations, including the bonds owned by appellant have been fully paid, with interest, according to the controlling State laws.

FOURTH PROPOSITION: THE DECREE, AS APPLIED, IMPAIRS VESTED RIGHTS OF APPELLANT IN VIOLATION OF THE 5TH AMENDMENT TO U. S. CONSTITUTION.

The substantive rights of appellant are not questioned. They have been clearly and unequivocally construed and confirmed in the cases cited above. The final decree is bottomed on a federal statute (Chap. IX, Bkty. Act). If allowed, it not only breaks the contract owned by appellant, but conflicts with controlling decisions of both the State and U. S. Supreme Courts. In *Louisville Jt. Stock Land Bank v. Rad-*

ford, 55 S. Ct. 854 it was held that the bankruptcy power of Congress is subject to the Fifth Amendment.

In California the controlling purpose of the Irrigation District law is to borrow money, to finance the cost of soil and water conservation systems. All the land within each district is dedicated a public trust. Such dedication ranks higher in dignity and importance than the dedication in Kentucky to secure the mortgages involved in the *Radford* case. The statutory lien for unpaid irrigation district taxes ranks ahead of mortgage liens, whenever created. (*Fallbrook v. Cowan*, 131 F. (2d) 513. Cert. denied.)

The final decree has the force and effect of confiscating appellant's property to pay the taxes of private holders of land and mortgages, and of making squatters into land owners, by federal decree.

It is submitted that such judicial intervention is no more within the powers granted to Courts of Congress, than for a State by simple statute to authorize its Courts to regulate and control private claims to land within the federal domain, contrary to federal law and decisions.

The decree, as applied, also appears to violate Rev. St. § 3224, 26 U.S.C.A. § 1543, as follows: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court." The one and only practical effect of the decree, if its stand will be to "restrain the assessment and collection of taxes" which are fixed and mandatory under California law.

Therefore, the final decree, as applied, is objected to because it impairs vested rights of appellant in violation of the Fifth Amendment to the United States Constitution.

FIFTH PROPOSITION: THE DECREE, AS APPLIED TO THE STILL OUTSTANDING ORIGINAL BONDS IMPAIRS A CONTRACT AND TRUST OBLIGATION EXECUTED BY THE STATE OF CALIFORNIA AND SECURED BY ART. I, SEC. 10, CL. 1 OF U. S. CONSTITUTION, AND BY ART. I, SEC. 16 AND ART. XIII, SEC. 6 OF CALIFORNIA CONSTITUTION.

The claim of appellant consists of a contractual obligation evidenced by bonds and coupons issued in 1917 and 1920 and governed by the laws applicable on those dates. There is no complaint that appellee does not have the power to collect revenue sufficient to pay appellant in full.

Stats. 1939, Ch. 72 which is the statute purporting to consent to Federal jurisdiction, applied retrospectively to previously executed contract obligations made by the State or its agencies, would contravene Art. I, Sec. 10, cl. 1 of the U. S. Constitution, and also Art. I, Sec. 16 and Art. XIII, Sec. 6 of the California Constitution.

Shouse v. Quinley and *Selby v. Oakdale* I. D. supra;

County of Los Angeles v. Rockhold, 3 Cal. (2d) 192.

An attempt by the Arkansas Legislature and Supreme Court to give tax delinquent holders of land more time, after a tax title deed had been executed

was disallowed in *Wood v. Lovett*, 313 U.S. 362, as an impairment of contract in a tax title deed. But, the rights of private holders of tax title deeds rest on a very different base from the rights of persons holding a contract with the State or its agency promising to repay money borrowed. The California Court in *Provident v. Zumwalt*, supra, explains that the holder of a tax title deed must assume payment of assessments to pay the bonds of the district the same as the previous title holder, until they are all fully paid, with interest.

There was nothing in the laws of California, at the time the bonds owned by appellant were issued which allowed any federal intervention and appellant's bonds and coupons are immune from impairment by any Court decree, except upon proof that they suffer from some legal infirmity.

In *Cargile v. N. Y. Tr. Co.*, 67 F. (2d) 585 a proceeding to which the State had waived its immunity and consented to be sued, was disallowed on the ground that the State was the real party in interest, and therefore the jurisdiction of the federal Court must fail.

The final decree, as applied contravenes the principle announced by this Court in the case of *Security 1st Nat. Bank v. Rindge L. & N. Co.*, 85 F. (2d) 557, 561, Cert. denied 299 U. S. 613 that a mortgage holder must be paid, because of the protection guaranteed by the Federal Constitution.

In *Petition of Schwarz*, 61 N.Y.S. (2d) 578, the Supreme Court of N. Y. decreed that: "The admin-

istration of a trust of land is governed by the law of that State only." (Restatement of Conflict of Laws, Sec. 243.)

An attempt by the Province of Alberta to impair the obligation of contract in similar bonds was disallowed as *ultra vires* in *Board of Trustees Lethbridge Northern Irrigation District v. I. O. F.*, 2 L.L.R. 273 (1940). Also in *Reference re Debt Adj. Act 1937*, 1 D.L.R. 1, the Canada Supreme Court and in *Plourde v. Roy*, 1 D.L.R. 426, the Alberta Supreme Court disallowed the statutes as *ultra vires*.

The final decree, as applied to appellant's still outstanding original 6% Paradise Irr. Dist. bonds is an order appellee cannot lawfully obey and it is objected to because it contravenes the provisions of Art. I, Sec. 10, Cl. 1 of the U. S. Constitution, and also of Art. I, Sec. 16 and Art. VIII, Sec. 6 of the California Constitution.

SIXTH PROPOSITION: THE DECREE LIMITING THE TIME WITHIN WHICH TO CLAIM THE FUNDS IN CUSTODIA LEGIS TO 12 MONTHS IS AN ERROR OF LAW.

The administration of the fund *in custodia legis* on account of appellant's claim is governed and controlled by Judicial Code, Sections 851-852, Title 28, which provides no limitation on the time within which appellant's claim may be filed and paid. No authority to impose any time limitation is allowed by 11 USCA 401-403, the base of this case. Objection to this part of the decree was duly presented (R. 5) and supported by brief (R. 7/21). The objection was ignored by

appellee (R. 23). This limitation in the decree should be set aside by this Court, on the grounds that it is unfair to appellant, and that it is an error of law. Appellee has not, and can not justly object to this modification, which is respectfully requested.

SEVENTH PROPOSITION: THE INJUNCTIVE PROVISIONS IN THE FINAL DECREE AS APPLIED, ARE AN ERROR OF LAW, AND A GIFT OF PUBLIC FUNDS PROHIBITED BY ART. IV, SEC. 31 OF THE CALIFORNIA CONSTITUTION.

Objections to the injunctive provisions in the final decree were also duly presented. (R. 6.) Brief and citations in support thereof were also submitted. (R. 12/19.) In addition to conflicting with the statutes, code provisions and citations presented (R. 12/19), the decree as applied contravenes the prohibition in Rev. St. § 3224, 26 USCA §1543, as follows:

“No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.”

The one and only effect of the injunction in the final decree, if it stand, would be to “restrain the assessment and collection of taxes” and therefore conflict with the controlling State law as construed and applied in *Provident v. Zumwalt* and *Moody v. Provident*, supra.

An injunction presupposes that the Court has obtained jurisdiction of the property of a bankrupt. No such jurisdiction is permitted under Chap. IX of the Bankruptcy Act. *Spellings v. Dewey*, supra. Also

that a decree may be entered enjoining and restraining the bankrupt from certain future conduct. No such jurisdiction is granted under Chap. IX. Nothing in the contract between appellee and the RFC would be infringed by removing the injunction in the final decree. No one has objected to its exclusion, as requested. (R. 6, 12/19.)

The Federal Statute, 28 USCA § 379 expressly prohibits the issuance of any injunction to restrain proceedings in a State Court, except in certain cases based on the Federal Bankruptcy power. Proceedings under Chap. IX of the Bankruptcy Act are not actions *in rem*, and even when the bankruptcy proceeding is a *res* case, an injunction is to be sparingly applied. (*Toucey v. N. Y. Life Ins. Co.*, 314 U. S. 119.)

The funds in possession of the district treasurer have not been covered in any way in this proceeding. Those funds, present and future, are trust funds in and to which appellant, as a *cestui que trust*, has a statutory and continuing interest and vested right. Appellee is a trust of land, a political subdivision of the State of California, and its officers and affairs are fiscal affairs of the State, subject to no federal veto or interference "where that action would contravene the provisions of the Federal Constitution." (*U. S. v. Bekins*, *supra*.)

The only injunction authorized in the Federal Statute forming the base of this proceeding, is for the period before the final decree is entered. Nothing in Chap. IX allows a final decree to include any in-

junctive provisions whatever. The only reference to an injunction in this Federal Statute, is in Section 403(c). Had the Congress intended Chap. IX proceedings to be immune from the inhibitions in 28 USCA § 379, it failed to say so. Therefore, the injunctive provision, as follows "be and they are hereby forever restrained and enjoined from otherwise asserting any claim or demand whatsoever as against the petitioning district or its officers, or against the property situated therein or the owners thereof" (R. 21-32) is without warrant of law, deprives appellant of vested rights secured by the U. S. Constitution, and it conflicts with the controlling State law as construed and applied in *Moody v. Provident*, supra, and with recent U. S. Supreme Court cases, supra.

Because the sole effect of the injunction complained of, if it stand, would be to unlawfully give funds belonging to the State, or its agency, it also contravenes the provisions in Art. IV, Sec. 31 of the California Constitution.

EIGHTH PROPOSITION: THE DECREE WHICH GIVES LONG TERM 4% BONDS TO ONE CREDITOR, BUT DENIES EQUAL TREATMENT TO APPELLANT'S CLAIM IS UNFAIR.

In *Mason v. Paradise I. D.*, 326 U. S. 536, the Court said:

"The fact that the R.F.C. holds the vast majority of all the bonds * * * does not mean that it is entitled to preferred treatment. It is clear that it is not."

Then, the Court said:

“It is, of course possible that 52.521 cents in cash may not be as advantageous an offer as 52.521 cents in new and refunding bonds. But there is no showing that it is not. Hence it is impossible for us to say that, although a difference in treatment was warranted, any discrimination in favor of the R.F.C. was so great as to be unfair.”

The R.F.C. loan to appellee was disbursed under instructions dated December 17, 1934. (R. 87, No. 9925.) Appellee contracted to pay interest at 4% on the amount borrowed from RFC which equalled 52.521% of the face value of the original 6% bonds. This interest has been paid to the RFC. (R. 149, No. 9925.) All interest due the RFC since 1934 has been paid, while the interest lawfully due appellant upon his original 6% bonds since 1934 has been unlawfully withheld, except for two small interest payments in November 1936 and January 1937, on prior matured coupons. (R. 157, No. 9925.) Thus, interest has been paid on the claim of the RFC at 4% per annum, amounting to at least 40% of that claim. This past due interest is denied appellant, even to the equal extent of 4% on 52.521% of the principal, which fact appellee is invited to deny, if incorrect.

The plan of composition which allows the RFC to pocket and retain full interest on its claim, which appellee has paid the RFC in violation of Section 52 of the controlling State law, and also to give the RFC long term refundings bonds, with interest fixed at 4% tax exempt, while disallowing appellant any

interest on his claim during the same years, and denying him the equal privilege of taking the refunding bonds, is clearly a gross case of discrimination not permissible by Chap. IX or any other chapter of the Bankruptcy Act.

As said by Mr. J. Frankfurter, dissenting in this case: "Nor do considerations of policy require that the RFC be given such a two faced character * * * It must be remembered, however, that the mere failure * * * to accept a plan of composition does not prove that its resistance is improperly or unfairly recalcitrant. * * * In establishing these classes, creditors are not properly grouped who, on the face value of the same bonds, get different equivalents, and are, as to the only thing that matters, not bound together by the same ties but separated by antagonistic interests."

The decree, as applied, violates both State and Federal law, including § 83, sub. d. of the Act, 11 USCA § 403, sub. d.

NINTH PROPOSITION: THE DISCHARGE, AS APPLIED CONFLICTS WITH THE DENIAL OF DISCHARGE FROM THE SAME DEBTS, AND WHICH IS RES JUDICATA.

The same plan of composition involved in the instant case, was presented by appellee on January 14, 1936, to the U. S. District Court.

"J. R. Mason appeared and filed an answer setting up the unconstitutionality of the Act and substantially the same defenses that he has set up in this pleading. He also filed a Motion to

Dismiss, and this Court on October 28, 1936, entered a judgment of dismissal which has never been appealed from and is now final, a copy of which judgment of dismissal was admitted in evidence as Respondent's Exhibit No. 4." (R. 86/89, No. 9925.)

The case of *Chicot Co. Dr. Dist. v. Baxter State Bank*, 308 U. S. 371 is controlling, the Court having announced at page 377:

"There can be no doubt that if the question of the constitutionality of the statute (11 USCA 301-304) had actually been raised and decided by the District Court in the proceeding to effect a plan of debt re-adjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal. *Stoll v. Gottlieb*, 305 US 165."

More recently this Court in the case of *Shepherd v. McDonald*, 157 Fed. (2d) 467 ruled squarely that

"* * * denial of a discharge from the debts provable, or failure to apply for it within the statutory time, bars an application in a second proceeding for discharge from the same debts."

Had appellant ignored the first proceeding, there is no question that it could now be effectively pleaded as *res judicata* by appellee, and no second proceeding would have been necessary, under the rule announced in the *Chicot County* case, *supra*. Appellant did not, like the Baxter State Bank, ignore the first proceeding, and he obtained a judgment, which is long since final. (R. 89, No. 9925.)

In *Nashville C. & St. L. RR. Co. v. Walters*, 294 U. S. 405, 415, appears

“* * * a statute valid, when enacted, may become invalid by a change in the conditions to which it is applied.”

It is requested that the judgment of dismissal (R. 89, No. 9925), be given the full faith and credit that it is entitled to according to the law as construed and applied in the *Chicot County* case, *supra*.

SUMMARY.

Paradise Irrigation District is a trust of land within the sovereign domain of California, the rents, issues and profits of which are fixed and controlled by State law and decisions when, as here, no federal right is asserted. The above cited recent cases by the Supreme Court of the U. S. adhere steadfastly to the immunity of such State affairs from federal interference, and are decisive that the Courts of Congress must give this doctrine of immunity full effect. Nothing in 11 USCA 401-403 or in any decision by the U. S. Supreme Court, including the *Bekins* case reverses or even modifies this paramount sovereignty of the States to tax and control the private tenure of land within the domain of the States, and to execute fixed and irrevocable contracts to repay money borrowed by the States or their political subdivisions.

The rent of this trust of land is security for the claim of appellant. The net rent which speculators will be in position to misappropriate will increase, should the final decree, as applied be allowed, because the annual *ad-valorem* land assessments required by law to repay the money invested by appellant, could then be lowered. Instead of promoting the common good, such a decree can only have the economic effect of making the cost of acquiring desirable home, orchard and farm sites even more prohibitive to those now landless.

That this economic consequence has already largely come to pass appears in "A Trip to Paradise", (Editorial page of San Francisco Chronicle, May 16, 1947), which reveals that land prices in Paradise Irrigation District "are soaring, and almond acreage you could have picked up in 1929 for \$50 an acre now costs \$1000 an acre and over."

The late Justice Cardozo in the case of *Morningstar v. Lafayette Hotel Co.* (1914), 211 N. Y. 465, wrote:

"To enforce one's rights when they are violated is never a legal wrong, and may often be a moral duty. It happens in many instances that the violation passes with no effort to redress it—sometimes from praiseworthy forbearance, sometimes from weakness, sometimes from mere inertia. But the law, which creates a right, can certainly not concede that an insistence upon its enforcement is evidence of a wrong."

In *Catholic Order of Foresters v. State of North Dakota*, 67 N. D. 228, 271 N. W. 670, the State Supreme Court observed as follows:

“It follows that the question here is purely and simply one of contract. Whether profit shall be made or loss shall be suffered by either the maker or the holders of these bonds, is wholly immaterial.

The rights and obligations of the parties are defined by the contract in the bond, including, of course, the statute pursuant to which the bonds were issued.”

Wherefore the final decree which contravenes the rights and obligations of the parties ought to be amended so as to protect the claim of appellant, or else set aside and reversed, and this proceeding dismissed upon one or more of the constitutional and statutory grounds above presented.

Dated, San Francisco, California,

April 9, 1948.

Respectfully submitted,

J. R. MASON,

Appellant, Pro se.

No. 11781

United States
Circuit Court of Appeals
For the Ninth Circuit.

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

JAN 23 1948

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature. errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	15
Appeal:	
Notice of.....	77
Cost Bond on.....	78
Statement of the Points Upon Which Appellant Intends to Rely Upon.....	82
Stipulation as to the Record on.....	83
Order Enlarging Time in Which to File the Record on.....	86
Certificate of Clerk to Transcript of Record on	87
Appearances	76
Certificate of Clerk to Transcript of Record on Appeal	87
Complaint for Refund of Taxes Illegally Collected	2
Cost Bond on Appeal.....	78
Defendant's Request for Findings of Fact and Conclusions of Law.....	47
Findings of Fact and Conclusions of Law.	48, 63
Conclusions of Law.....	55, 71
Findings of Fact.....	48, 63

INDEX	PAGE
Judgment	72
Minute Orders:	
January 28, 1946—Consolidating Cases Nos. 25228-G and 25229-G for Trial.....	17
March 28, 1946—Consolidating Four Cases for Trial.....	19
July 29, 1946—Submitting Cases.....	22
January 2, 1947—Judgment Be Entered in All Four Cases Upon Findings of Fact and Conclusions of Law to Be Presented	23
April 29, 1947—Order That Engrossed Findings and Judgments Be Filed and Entered	73
Motion for Judgment.....	20
Motion for Judgment on the Pleadings.....	18
Motion for Leave to Enter Appearance of Addi- tional Attorneys for Plaintiff.....	74
Consent to Entry of Order.....	75
Motion for Order Dispensing With the Neces- sity of Printing Exhibits.....	492
Names and Addresses of Attorneys.....	1
Notice of Appeal to Circuit Court of Appeals Under Rule 73(b)	77

	INDEX	PAGE
Opinion		25
Order Dispensing With the Necessity of Printing Exhibits.....		494
Order Enlarging the Time in Which to File the Record on Appeal.....		86
Order Extending Time to File the Record on Appeal and Docket the Action on Appeal....		80
Order Granting Leave to Enter Appearances...		75
Order Granting Leave to Withdraw as Attorneys		82
Order Settling Findings of Fact and Conclusions of Law.....		62
Plaintiffs' Objections and Suggestions for Amendments and Additions to Findings of Fact and Conclusions of Law.....		57
Reporter's Transcript.....		88
Witnesses, Defendant's:		
Casaday, J. D.		
—direct		464
Forbes, H. F.		
—direct		470
McCaffrey, Morris P.		
—direct		475
Nicholes, Vern L.		
—direct		466

	INDEX	PAGE
Witnesses, Plaintiff's:		
Bitler, Eugene		
—direct		112
—cross		145
—redirect		163
—recross		164
Casaday, J. D.		
—direct		339
—cross		362, 388
—redirect		410
—recross		413
McGarry, Frank R.		
—direct		447
—cross		448
—redirect		448
Nichols, Vern E.		
—direct		422
—cross		423
—redirect		443
Parrish, William		
—direct		165
—cross		235
—redirect		317
—recross		333
Snaer, Seymour		
—direct		385
—cross		387
Winchester, E. R.		
—direct		445
—cross		446

INDEX	PAGE
Statement of Points Upon Which Appellant Intends to Rely, and Designation of the Parts of the Record Necessary for the Consideration Thereof.....	495
Statement of the Points Upon Which Appellant Intends to Rely Upon Appeal.....	82
Stipulation	56
Stipulation as to the Record on Appeal.....	83
Stipulation for Extension of the Time for Filing the Record on Appeal and Docketing the Action	79
Summons	14
Withdrawal of Attorneys.....	81
Consent to Withdrawal.....	81

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In the United States District Court, for the
Northern District of California, Southern
Division

Civil Action No. 25228-G

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF TAXES
ILLEGALLY COLLECTED

Plaintiff complains of defendant and for cause
of action alleges:

I.

Plaintiff is, and at all times herein referred to
was, a corporation organized and existing under
and by virtue of the laws of the State of California
qualified to, and doing business in the Southern
Division of the Northern District of California and
elsewhere, and is a citizen of the United States of
America.

II.

Plaintiff is now and for many years last past and
at all times herein mentioned has been the Owner
and Publisher of the San Francisco Examiner and
the San Francisco Call-Bulletin, each of which is
a daily newspaper, published, printed, sold, circ-

lated and distributed in the City and County of San Francisco, State of [1*] California.

III.

This is an action for the recovery of Social Security and Federal Unemployment Taxes erroneously and illegally collected under the provisions of Title IX of the Social Security Act and the Federal Unemployment Tax Act, from plaintiff. It is brought against the United States of America.

IV.

At all times as used herein the term "News Vendor" means a person over the age of eighteen (18) years who purchased newspapers at wholesale from the Plaintiff publisher and resells the same at retail upon the public streets in the City and County of San Francisco, State of California.

V.

Heretofore, and on or about the 9th day of February, 1942, the Collector of Internal Revenue for the 1st District of California issued and sent to plaintiff his Notice and Demand for Tax Due under Title IX of the Social Security Act demanding payment within ten days from said date of the sum of \$1,302.01 tax, and interest in the sum of \$312.48, a total of \$1,614.49, alleged to be due for the period, January 1, 1937, to December 31, 1937, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the

* Page numbering appearing at foot of page of original certified Transcript.

San Francisco Examiner and the San Francisco Call-Bulletin in the City of San Francisco.

VI.

Thereafter, and on or about February 14, 1942, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written protest and claim for refund of the said sum of \$1,614.49. A copy of said written protest and claim for refund is hereunto attached marked Exhibit "1" and is by this reference made a part hereof. Plaintiff in said written protest and claim for refund [2] stated the grounds of said protest and the basis of the said claim for refund.

VII.

Thereafter the Commissioner of Internal Revenue disallowed and rejected the said claim for refund and pursuant to the provisions of Section 3772(a)(2) of the Internal Revenue Code the Commissioner of Internal Revenue by registered letter bearing date July 13, 1945, advised plaintiff that said claim for refund was disallowed. A copy of the said letter is hereunto attached marked Exhibit "2" and is by this reference made a part hereof.

VIII.

That the San Francisco Examiner and the San Francisco Call-Bulletin, each a daily newspaper, for many years last past and at all times herein mentioned have been sold at retail on the public streets of the City and County of San Francisco, State of California, by news vendors. Said news

vendors purchase copies of the San Francisco Examiner and the San Francisco Call-Bulletin at a wholesale rate per 100 copies and thereafter sell said newspapers to buyers thereof at the retail sale price of five cents per copy for each copy of the daily issue of said newspapers and at the established retail sale price for the Sunday issue of said San Francisco Examiner.

IX.

At all times herein mentioned the profit to news vendors has been and now is the difference between the wholesale price per 100 copies and the retail sales price per copy charged by said news vendors to the purchasers thereof.

X.

In the year 1937 the news vendors joined together in an organization and represented to the plaintiff that as an organization they desired to enter into a contract providing, among other things, for the purchase and sale of newspapers in said City. [3]

Thereafter, after negotiations between plaintiff and said organization, said parties agreed upon the conditions to be incorporated in a contract providing, among other things, for the purchase and sale of newspapers in said City. Said contract was reduced to writing and on or about August 31, 1937, was signed by plaintiff, and the said organization of news vendors. A copy of said contract is hereto attached marked Exhibit "3" and is by this reference made a part hereof.

XI.

During all of the period of the negotiation of the said contract, Exhibit "3", and at the time of the execution thereof it was the intent and purpose of the organization of news vendors and of plaintiff to create and maintain as between the news vendors and plaintiff the relationship of buyer and seller and to establish and maintain the news vendors as independent contractors.

XII.

Subsequent to the execution of the said contract, Exhibit "3", and throughout the term thereof, the said news vendors and plaintiff construed and interpreted said contract as establishing as between said parties the relationship of buyer and seller and construed and interpreted the status of the news vendors under the provisions of said contract as that of independent contractors and not otherwise. Said parties throughout all of the terms of said contract acted with the intent and in the belief that the said contract would be interpreted and construed as intended by said parties.

XIII.

Thereafter on January 24, 1939, and May 28, 1940, and August 31, 1942, and August 28, 1944, said parties entered into new contracts. Each of said contracts [4] provide, among other things, for the purchase at wholesale and to the sale at retail by said news vendors of newspapers on the streets

of the City and County of San Francisco, State of California, and are similar in text, with some modifications, to the contract of August 31, 1937, Exhibit "3", but the terms of none of which subsequent contracts modified or purport to modify in any respect the independent relationship of the parties thereto.

XIV

During all of the period of negotiation of each of the said four contracts subsequent to Exhibit "3" and at the time of the execution of each thereof it was the intent and purpose of the organization of news vendors and of plaintiff to maintain the relationship of buyer and seller and to maintain the status of said news vendors as independent contractors. Said parties during the term of said contracts have acted with the intent and in the belief that the said contracts would be interpreted and construed as intended by said parties.

XV.

That none of the news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin, each a daily newspaper, on the streets of the City and County of San Francisco, State of California, are now and none thereof have at any time been employees of plaintiff. Said news vendors are now and always have been independent contractors purchasing from plaintiff newspapers at a wholesale price per 100 copies and thereafter selling said newspapers at retail to the public at a retail price.

That plaintiff neither has nor exercises nor claims to have or exercise any control or any right to control over the means and methods of said news vendors or any of them in the retail sale of said newspapers to the public on the public streets of the City and County of San Francisco, State of California, and said news vendors are responsible to plaintiff for the results [5] accomplished in the retail sale of said newspapers to the public and on the public streets in said City only.

XVI.

That there is no liability of plaintiff under Title IX of the Social Security Act for the sum of \$1,302.01 tax, and interest in the sum of \$312.48, a total of \$1,614.49, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, January 1, 1937, to December 31, 1937.

XVII.

No part of the sum of \$1,614.49 claimed by plaintiff as a refund as alleged in Paragraph VI hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Social Security and/or Federal Unemployment Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, Plaintiff demands judgment against

defendant for the sum of \$1,614.49, interest and costs.

Count II

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this complaint.

II.

Heretofore, and on or about the 23rd day of January, 1943, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under Title IX of the Social Security Act, demanding payment within ten days from said date of the sum of \$2,048.41 tax, and interest in the sum of \$423.06, a total of \$2,531.47, alleged to be due for the period, January 1, 1938, to December 31, 1939, under the provisions of said Act on the assumed or alleged earnings of news vendors selling the San Francisco Examiner and the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter and on or about the 22nd day of January, 1943, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written protest and claim for refund of the said sum of \$2,531.47. A copy of said written protest and claim for refund is hereunto attached marked Exhibit

"4" and is by this reference made a part hereof. Plaintiff in said written protest and claim for refund stated the grounds of said protest and the basis of the said claim for refund.

IV.

That there is no liability of plaintiff under the Social Security Act for the sums of \$2,048.41 tax, and interest in the sum of \$483.06, a total of \$2,531.47, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, January 1, 1938, to December 31, 1938.

V.

No part of the sum of \$2,531.47, claimed by plaintiff as a refund as alleged in Paragraph VI hereof has been refunded nor has the same or any thereof been credited upon the admitted liability for Social Security or Federal Unemployment Insurance Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law, is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$2,531.47, interest and costs. [7]

Count III

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV,

VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this complaint.

II.

Heretofore, and on or about the 2nd day of February, 1945, the Collector of Internal Revenue for the First District of California issued and sent to plaintiff his Notice and Demand for Tax Due Under Title IX of the Social Security Act, demanding payment within ten days from said date of the sum of \$1,765.59 tax, and interest in the sum of \$422.17, a total of \$2,187.76, alleged to be due "for the calendar year 1940," under the provisions of said Act on the assumed or alleged earnings of News vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter, and on or about the 12th day of February, 1945, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written protest and claim for refund of the said sum of \$2,187.76. A copy of said written protest and claim for refund is hereunto attached marked Exhibit "5" and is by this reference made a part hereof.

Plaintiff in said written protest and claim for refund stated the grounds of said protest and the basis of the said claim for refund.

IV.

That there is no liability of plaintiff under the Social Security Act for the sums of \$1,765.59 tax,

and interest in the sum of \$422.17, a total of \$2,187.76, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the [8] City and County of San Francisco, State of California, for and during "the calendar year 1940."

V.

No part of the sum of \$2,187.76, claimed by plaintiff as a refund as alleged in Paragraph VI hereof has been refunded nor has the same or any thereof been credited upon the admitted liability for Social Security or Federal Unemployment Insurance Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law, is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$2,187.76, interest and costs.

That by reason of the premises, plaintiff is entitled to judgment against defendant for the aggregate sum of \$6,333.72, together with interest as prayed in each cause of action hereinabove pleaded, as provided by law; for costs of suit, and for such other relief as to the Court may seem meet and just.

Dated, San Francisco, California, October 11, 1945.

FINK & KEYSTON,

By /s/ GROVE J. FINK,

Attorneys for Plaintiff. [9]

State of California,
City and County of San Francisco—ss.

Clarence R. Lindner, being first duly sworn, deposes and says:

That he is Vice-President of Hearst Publications, Incorporated, the plaintiff named herein; that he has read the above and foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes them to be true.

/s/ CLARENCE R. LINDNER.

Subscribed and sworn to before me this 11th day of October, 1945.

[Seal] /s/ KATHARINE T. McDONNELL,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed] Filed Oct. 11, 1945. [10]

Note

The exhibits attached to the complaint are identical with exhibits offered in evidence. The following table shows the exhibit number in the complaint and the corresponding exhibit number of the same document as introduced in evidence.

Exhibit Number In Complaint		Plaintiff's Exhibit Number in Evidence
1	.....	21
2	.....	22
3	.....	4
4	.....	23
5	.....	24

District Court of the United States for the Northern
District of California, Southern Division

Civil Action File No. 25228-G

HEARST PUBLICATIONS, INCORPORATED,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Messrs. Fink & Keyston, plaintiff's attorneys, whose address is: 1018 Hearst Building, San Francisco, Calif., an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court]

C. W. CALBREATH.

Clerk of the Court.

By WM. J. CROSBY,

Deputy Clerk.

Date: Oct. 11, 1945. [12]

[Endorsed]: Received Oct. 16, 1945 U. S. Marshal's Office, San Francisco, Calif., Civil 26746.
Filed Oct. 18, 1945, C. W. Calbreath, Clerk.

[Title of District Court and Cause.]

ANSWER

For answer to the complaint herein, the defendant states as follows:

1. Defendant admits the allegations of paragraphs I, II and VII of Count I and paragraphs III of each of Counts II and III of the complaint.

2. Defendant denies the allegations of paragraphs XV, XVI and XVII of Count I and paragraphs IV and V in each of Counts II and III of the complaint.

3. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs IV, IX, XI, XII, XIII and XIV of Count I of the complaint and therefore denies every allegation therein.

4. Answering paragraph V of Count I and paragraph II in each of Counts II and III of the complaint, defendants admits the allegations thereof, except that defendant denies that the tax therein referred to was based on the assumed or alleged earnings of news vendors selling the San Francisco Examiner and the San Francisco Call-Bulletin in the City of San Francisco, and alleges that said tax was measured by the remuneration received by said vendors as employees of the plaintiff in the sale of said newspapers.

5. Answering paragraph VI of Count I of the complaint, [13] defendant admits the allegations

thereof, except with respect to the date of February 14, 1942, therein referred to, which is denied and is alleged to be February 16, 1942.

6. Answering paragraph VIII of Count I of the complaint, defendant admits the allegations of the first sentence thereof and denies the allegations of the second sentence thereof.

7. Answering paragraph X of Count I of the complaint, defendant admits that Exhibit "3" to the complaint is a true copy of a document executed by the persons whose signatures are subscribed thereto, but denies every other allegation therein.

8. Answering paragraph I in each of Counts II and III of the complaint, defendant incorporates by reference its answer to the paragraphs of the complaint therein referred to.

Wherefore, defendant prays that judgment be entered against plaintiff for costs and all other proper relief.

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

[Endorsed]: Filed Jan. 15, 1946. [14]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the
United States for the Northern District of California,
Southern Division, held at the Court Room
thereof, in the City and County of San Francisco,
on Monday, the 28th day of January, in the year of
our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 25228-G

HEARST PUBLICATIONS, INC., etc.,

vs.

UNITED STATES OF AMERICA,

No. 25229-G

HEARST PUBLICATIONS, INC., etc.

vs.

UNITED STATES OF AMERICA.

Minute Order January 28, 1946

ORDER CONSOLIDATING CASES No. 25228-G
AND 25229-G FOR TRIAL

The two above-entitled cases came on regularly
this day for hearing of motion to set for trial in each
case. After hearing G. D. Keyston, Esq., attorney
for plaintiff, and E. Bonsall, Esq., Assistant U. S.
Attorney, it is Ordered that said cases be consoli-
dated for trial on March 28, 1946 (Court). [15]

In the Southern Division of the United States District Court for the Northern District of California

Civil No. 25228-G

HEARST PUBLICATIONS, INCORPORATED, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR JUDGMENT ON THE
PLEADINGS

The defendant respectfully moves the Court that judgment be entered in favor of the defendant and against the plaintiff in the above-entitled cause, for the reason that the complaint in said cause does not state a claim upon which relief can be granted.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ W. E. LICKING,
Assistant United States Atty.,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 22, 1946. [16]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the
United States for the Northern District of California,
Southern Division, held at the Court Room
thereof, in the City and County of San Francisco,
on Thursday, the 28th day of March, in the year of
our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 25228-G, No. 25229-G

HEARST PUBLICATIONS, INC.,

vs.

THE UNITED STATES OF AMERICA.

No. 25230-G, No. 25231-G

THE CHRONICLE PUBLISHING CO.,

vs.

THE UNITED STATES OF AMERICA.

Minute Order March 28, 1946

ORDER CONSOLIDATING FOUR CASES
FOR TRIAL

These cases came on regularly this day for trial
before the court sitting without a jury. Grove Fink,
Esq., was present on behalf of the plaintiff, and
Mr. Ladar appeared on behalf of the Newspaper and
Periodical Vendor's Union as amicus curiae for the
plaintiff. Arthur L. Jacobs, Esq., and William Lick-
ing, Esq., were present on behalf of the defendant,

and Clarence Linn, Esq., appeared on behalf of the Attorney General of the State of California as amicus curiae. On motion of Mr. Fink, the four cases were ordered consolidated for the purposes of this trial. Mr. Jacobs made a motion for judgment on the pleadings on which a ruling was withheld. After opening statements by Mr. Fink and Mr. Jacobs, the case proceeded to trial. Eugene F. Bitler and William Parish were sworn and testified on behalf of the plaintiff, and the plaintiff introduced Plaintiff's Exhibits Nos. 1 to 45, inclusive, which were admitted into evidence. The defendant introduced Defendant's Exhibit A, which was admitted into evidence. Ordered that said cases be continued until March 29, 1946, for further trial. [17]

In the Southern Division of the United States District Court for the Northern District of California

Civil Actions Nos. 25229-S and 25228-G

HEARST PUBLICATIONS, INCORPORATED, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR JUDGMENT

The defendant respectfully moves the Court for judgment in favor of the defendant for the reasons

that under the pleadings, the evidence and the law:

1. The services performed by the plaintiff's news vendors were performed in the employment of the plaintiff within Sections 801, 804, 811 (b), 901 and 907 (c) of the Social Security Act, and within Sections 1400, 1410, 1426 (b), 1600 and 1607 (c) of the Internal Revenue Code.

2. The news vendors engaged in the sale of the newspapers published by the plaintiff were the employees of the plaintiff.

3. The determination of the Commissioner of Internal Revenue that the plaintiff's news vendors were its employees is presumptively correct and the plaintiff has failed to rebut that presumption.

4. The plaintiff has the burden of proving that the plaintiff's news vendors were independent contractors, which burden it has failed to sustain.

5. The taxes in question were legally assessed and lawfully collected.

6. The plaintiff has failed to prove a cause of action against the defendant. [19]

7. The record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.

8. The defendant is entitled to judgment dismissing plaintiff's complaints.

9. The plaintiff is not entitled to refund of any taxes imposed by Section 801 of the Social Security Act and Section 1400 of the Internal Revenue Code, since there is no statement in the claim for refund of such amount or proof upon the trial that

such taxes were repaid to the employees with respect to whom the taxes were imposed or that the plaintiff has the written consent of such employees for such refund.

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

By /s/ WILLIAM E. LICKING,

Assistant United States

Attorney.

[Endorsed]: Filed April 2, 1946. [20]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 29th day of July, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Causes.]

Minute Order of July 29, 1946

ORDER SUBMITTING CASES

The four above-entitled cases came on regularly this day for submission. On motion of Mr. Colvin, Assistant U. S. Attorney, it is Ordered that each of said cases be submitted. [21]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 2nd day of January, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Causes.]

Minute Order January 2, 1947

ORDER THAT JUDGMENT BE ENTERED
FOR DEFENDANT IN ALL FOUR CASES
UPON FINDINGS OF FACT AND CON-
CLUSIONS OF LAW TO BE PRESENTED

The four above-entitled cases heretofore having been tried before the Court sitting without a jury and submitted to the Court for consideration and decision, and the same having been fully considered, it is Ordered that judgment be entered for defendant in all four cases upon findings of fact and conclusions of law to be presented in accordance with the written opinion filed on this date. [22]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25228, No. 25229

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 25230, No. 25231

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Fink & Keyston, 1018 Hearst Building, San
Francisco, California, Attorneys for Plaintiff.

Frank J. Hennessy, United States Attorney;
William E. Licking, Assistant United States At-
torney, San Francisco, California; Douglas W.
McGregor, Assistant Attorney General; Andrew D.
Sharpe and Arthur L. Jacobs, Special Assistants
to the Attorney General, Washington, D. C.,
Attorneys for Defendant.

S. A. Ladar, 111 Sutter Street, San Francisco, California, Attorney for Newspaper & Periodical Vendors and Distributors Union No. 468, *Amicus Curiae*.

OPINION

Goodman, District Judge.

By these four actions, consolidated for trial, plaintiff newspaper publishers seek refund of insurance contributions and unemployment taxes collected from them, for taxable periods within the years 1937-1940, upon the compensation received by vendors of their publications on the streets of the City of San Francisco who, it is claimed by plaintiffs, were not their employees. The single issue to be here determined is the status of these vendors during that period. If their relationship to plaintiffs was one of employment within the purport of the applicable statutes, (Social Security Act, Title VIII and Title IX, 42 USCA Sec. 1001-1100; Federal Insurance Contributions Act, 26 USCA Int. Rev. Code, Sec. 1400-1432; Federal Unemployment Tax Act, 26 USCA Int. Rev. Code, Sections 1600-1611) the taxes were properly imposed; otherwise not.

The Facts

Plaintiffs are owners and publishers of daily newspapers circulated primarily in San Francisco; a substantial portion of this circulation is effected through street sales by the news vendors whose status is here in issue. During all of the period

here involved, (1937-1940) except from April, 1937 to August, 1937, plaintiff publishers and their vendors were governed in their relationship by successive written contracts between the San Francisco Newspaper Publishers' Association, as the publishers' representatives, and the Newspaper and Periodical Vendors' and Distributors' Union No. 468 representing the vendors. (The latter is a labor union chartered by the American Federation of Labor.) Three such written contracts were negotiated during the pertinent taxable period, in [23] 1937, 1939 and 1940. However, all the contracts are admittedly similar in such of their terms as are here material. And although there was no written agreement between publishers and vendors from April 1937 to August 1937, their relationship was akin to that established by the succeeding written contracts, except for the exercise of a greater degree of control by the publishers over activities of the vendors in matters which were thereafter settled by the terms of the negotiated contracts.

The facts bearing on the relationship between publishers and vendors as fixed by contract and as appearing from their actual operations during the period here involved are these:

The vendors were engaged by the publishers to sell newspapers at particular street locations. Prior to 1939, such vendors would apply directly to the publishers for assignment to any vacant street corner. After 1939, the union contracts required that vendors be selected by the publishers from a list of available vendors furnished them on request

by the vendors' union. The street sales locations were situated at corners characterized as full time corners, part time corners, special wrapped edition corners and special event corners. (There were also roving vendors called bootjackers who sell papers at large.) Such locations were designated, limited, changed, discontinued or re-established entirely at the publishers' discretion and in order to coincide with changing public demand. Prior to the first contract of August 1937, the services of a vendor were terminable at the will of the publisher. Thereafter, a vendor once engaged to sell at a particular location, was entitled by each of the successive contracts, to man that location so long as it was maintained by the publisher, unless there should arise just cause for the discontinuance of further deliveries of papers to him (e.g. drunkenness, failure to appear for work, etc.) or for his transfer from one location to another, in which event the publisher was entitled to effect such discontinuance or transfer. If a vendor felt that his contract to sell at a particular location had been unjustly discontinued by the publisher,—that is, without cause,—he could have the matter submitted to and determined by arbitration.

The publishers fixed the so-called "retail" price at which the papers were to be sold publicly as well as the so-called "wholesale" price, which was the amount charged the vendors for papers delivered them for sale. Once fixed, these prices remained constant for the duration of the union contract then in force. The difference between the "wholesale"

and "retail" price established by the publishers was the vendor's profit. But in addition thereto, he was guaranteed by contract a minimum weekly profit. The papers which he did not sell, he was privileged to return to the publisher and received credit therefor.

Within certain limits prescribed by contract, the publisher fixed for the various types of corner, the days and hours of sale, which were established to coincide with news releases, the public's reading habits and its concentration at particular locations at particular periods.

As each edition left the press, the papers were delivered to the vendors at their corners by employees of the publishers called "wholesalers." The quantity delivered did not rest in the vendor's discretion, but depended on what it was estimated the vendor, during the selling period, could dispose of at his location. And disagreement as to the number of papers the vendor should take appeared to be a matter for settlement between the publisher and the union.

Prior to August 1937, the wholesaler gave orders to the vendors in matters connected with the performance of their duties and disciplined them for failure to comply. But after August 1937, the wholesalers exercised little direct control over the vendors, although they did make suggestions, observed the conduct of the vendors and reported misfeasances to the publisher. Their chief [24] function was to deliver papers to the vendors at each edition time, survey their particular district between editions to see if more papers were needed

at a particular sales location, or if surplus papers should be transferred from one to another location. However, in case a wholesaler observed conduct of a vendor warranting dismissal, the evidence shows that the wholesaler would check-in the vendor before the end of the day's selling period. But any disciplining of news vendors, short of discontinuance of sales to them, was affected by union representatives.

In their sales to the public, the vendors were required to sell complete newspapers only, with sections in such order as was designated by the publishers. They were free to offer the papers for sale as they saw fit, except that they were expected to be at their corners at press release time, to stay there during the sales period, to be able to sell papers and to take an interest in selling papers.

The vendors had no expenses to bear and assumed no business risks except the risk of loss of papers delivered to them for sale and charged against them. They provided their own transportation to and from their sales locations. Some employed substitutes. They were not prohibited from selling non-competitive publications and other articles along with their newspaper sales, and some so did. (In 1937-1940 about 1/6 of the approximate 650 vendors were selling other articles and non-competitive publications.)

The vendors were not required to submit any form of report. There were no conferences or sales meetings which they were obliged to attend, nor was it necessary that they report to the publishers' premises for any purpose.

All advertising placards and display stands or racks were provided by the publisher and the vendors were forbidden to place anything on such stands or racks except newspapers.

In all of the contracts there was contained a clause declaring it to be the intent of the parties to maintain the relationship of seller and buyer between publisher and vendor and not an employer-employee relationship. The clause was inserted at the insistence of the publishers, the vendors agreeing because their primary concern was their economic betterment. They were disinterested in the designation of their status. They were also of the belief that in any event, their relationship with the publisher would not legally be regarded as that of employer-employee.

Discussion

The Federal Social Security Statutes (1) do not themselves define the terms "employment," "employer," or "employee" beyond stating generally that the term "employment" means any service performed by an "employee" for his "employer." The interpretive regulations of the Treasury Department (2) adopt as their criteria the indicia of the employment relationship established by the common law. The regulations do not,—no more than does the common law,—*adopt any test factor or factors as complete proof of the presence or absence of the employment relationship. They and the common law which they follow, have left ample room within

*Restatement of the law of Agency C.7, sec. 220.

the pattern they have set, for extensive or restrictive development through the judicial interpretive process, to meet changing and varying circumstances.

- (1) Social Security Act, 42 USC 1107, 1011.
Federal Insurance Contributions Act, 26 USC 1426 (b)
Federal Unemployment Tax Act 26 USC 1607 (c)
- (2) Treas. Reg. 91 Art. 3; Treas. Reg. 90 Art. 205;
Treas. Reg. 106, Sec. 402.204; Treas. Reg. 107
Sec. 403.204.

This seems clear to me, because it is evident from a study of the decisions interpreting the term "employment" in Social Security legislation, that, by and large, many courts essentially adhere to common law doctrines in reaching a desired result, while at the same time they ostensibly repudiate these doctrines in favor of newer and yet incompletely defined precepts.

The plaintiffs, pointing to the Treasury Department's interpretative regulations and to language used in federal and state court decisions, insist that common law tests control; wherefore, they argue, there is no employment relationship here present. In substantiation they point to factors in each case which, under common law principles, are "indicia" (but indicia, alone) of an independent contract relationship.

The United States contends that common law tests are not controlling, developed as they were in

connection with the imposition of vicarious liability in tort and for other unrelated purposes. It advances the doctrine that in view of the broad humanitarian objectives of the national social security laws, the term "employment" as there used must be interpreted to refer to any service relationship not incidental to the pursuit of an independent calling.

The United States relies upon the theme developed in the case of *National Labor Relations Board v. Hearst Publications, Inc.* 322 U. S. 111. There, a finding of employment, in the case of newspaper vendors, by the National Labor Relations Board, within the meaning of National Labor Relations Act, entitling the vendors to collective bargaining rights, was not disturbed because it had "warrant in the record" and a "reasonable basis in law." In the course of its opinion, however, the Supreme Court, in tacit approval of such finding, declared that in remedial federal legislation of the character there under consideration, the term "employment" covered a wider field than would be the case if common law principles were strictly adhered to; but that, nevertheless, it did not embrace within itself all "persons who may perform services for another or to ignore entirely legal classifications made for other purposes;" and that, interpreting the term in the light of the statutory objectives, "it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful ef-

fects in the special situation.” This language, apparently, strikes the keynote of the Government’s position that all persons performing services for others not in the pursuit of an independent calling are employees within the remedial legislation. It is obviously assumed that all such workers are peculiarly subject to the hazards of unemployment and old age indigency. (It is significant that, while propounding this legal the doctrine, the Government also finds comfort in the contention that such persons really were employees even under common-law standards.)

The language of the Supreme Court does not, in my opinion, demonstrate the broad principle contended for by the Government. Undoubtedly it is true that the intent of Congress was to provide for the general welfare through the establishment, in advance, of a provident fund for the needy worker by a system of taxation. Whether or not the general welfare, however, will be advanced, retarded or perhaps defeated by the Government-contended construction of the comparatively unabstruse term “employment so as to included persons who heretofore have always been regarded as independent contractors, is primarily a political, social and economic question for lawmaking rather than law interpreting.* And until Congress has spoken expressly to include such persons, it seems more con-

*It could be argued that the general welfare as well as that of the aged and unemployed would be hampered if, by too broad classification, the burden of taxation upon the employer class would reach beyond its capacity to absorb the load or pass it on.

sonant with established principles of judicial statutory construction to hold that the term "employment" should properly be interpreted in a realistically practical sense, according to established common law doctrines; in favor, however, of the employment relationship in doubtful cases, because of the remedial nature of the statutory objectives. This seems to be the real, underlying motif of all the federal and state decisions,—including that of the Supreme Court—which have so far dealt with the problem of cataloguing particular factual situations either within or without the employment relationship.

From these various decisions there evolves at least one principle,—determinative of this cause in favor of the employment status,—entirely reconcilable with established common law doctrines as developed and grown to meet new situations, and with the remedial objectives of social security legislation, and which is, at the same time realistically practical. That is, that any person is an employee within the meaning of social security legislation who is engaged as a means of livelihood in regularly performing personal services which (1) constitute an integral part of the business operations of another; (2) are not incidental to the pursuit of a separately established trade, business or profession,—involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large; and (3) are subject to a reasonable measure of general control over the manner and

means of their performance. *Matcovich v. Anglim*, 134 F. 2d 834 (9th Cir. 1943.); *General Wayne Inn. v. Rothensises*, 47 Fed. Supp. 391 (D.C. Penn. 1942); *Stone v. U. S.* (D.C. Penn. 1943) 55 Fed. Supp. 230; *United States v. Vogue, Inc.* (4th Cir. 1944) 145 F. 2d 609; *Lakie, Inc. v. U.S.A.* (D.C. Mich. Feb. 2, 1946); *United States v. The Wholesale Oil Co.* 154 Fed. 2d 745 (1946 10th Cir.); *Twentieth Century Lites, Inc. v. California Department of Employment* (Apr. 1946) 28 A.C. 67; *Deecy Products Co. v. Welch* (1st Cir. 1941) 124 F. 2d 592; *Jones v. Goodson* (10th Cir. 1941) 121 F. 2d 176.

Whether, absent any of the foregoing factors, the employment status may still be found, is not germane to the case here under consideration, (since it will be shown that all such factors are present). It presents a problem better left to future solution through the evolutionary judicial process of inclusion and exclusion. Sufficient to this case it is that the persons whose status is to be determined come well within the term "employee" as the decisions have so far reconcilably defined those factors which, when appearing in combination, establish the employment relationship in Social Security legislation.

It is, however, relevant to observe that wherever in the interpretation of Social Security legislation the employee status has been rejected in favor of the independent contractor or non-employment relationship, it has been on the basis of either the presence of a separate,—albiet interdependent,—

trade business, or profession involving capital outlay and the assumption of substantial business risks, or the offering of like services to the public in general,—or of the absence of any right of control over the manner and means of performance; or of both the presence of the former and the absence of the latter factor. *United States v. Aberdeen Aerie* No. 24, 148 F 2d 655 (9th Cir. 1945); *United States v. Silk*, 155 Fed. 2d 356 (1946 10th Cir.); *Nevin v. Rothensies*, 8 Fed. Supp. 460 (Pa. 1945); *Ridge Country Club v. U.S.* 135 F 2d 718 (7 Cir. 1943); *Anglim v. Empire Star Mines Co.* 129 Fed. 2d 914 (9th Cir. 1942); *Briggs v. California Employment Commission* (1946, Apr.) 28 A.C. 61; *Glen v. Beard* (6CCA) 141 Fed. 2d 376; *Texas v. Higgins* (2 CCA) 118 Fed. 2d 636; *Indian Refining Co. v. Dallman* (7 CAA) 119 F. 2d 417; *William v. U.S.* (7th CCA) 126 Fed. 2d 129; *U.S. v. Griswold* (1 CCA) 124 F. 2d 599; *Hirsch v. Rothensies* (D.C. Pa.) 56 F. Supp. 92; *Los Angeles Athletic Club v. U.S.* (D.C. Cal.) 54 F. Supp. 702; *Spillman v. Smith* (7th Cir.) 147 Fed. 2d 727; *Gulf Oil Corp. v. U.S.* 57 F. Supp. 376; *Nevin v. Rothensies* (D.C. Pa.) 58 F. Supp. 460; *Emard v. Squire* (D.C. Wash.) 58 F. Supp. 281. [27]

It may be, therefore, that ultimately the employee status in service relationships of doubtful nature will be made to depend on the absence of such a separate business or calling and on the presence of some degree of control over the manner and means of performance of the services. In fact, it seems reasonable to regard persons earning their

livelihood performing services for others, who have no established business or profession of their own and who are, in the performance of such services, subservient to the will of others, to be singularly subject to the hazards of unemployment and needy old age. On the other hand, those protected by capital reserve or equipped with the enterprising characteristics of a free agent, are more favorably endowed with what it takes to combat their own economic ills. A definitive limitation of the term "employment" along such lines, it seems to me, would more certainly fit into the commonly understood differentiation between persons employed by others and those self-employed, than that proposed by the Government. It also would be entirely consonant with traditional common-law precepts as they have been developed to meet a changing life picture. On the other hand, the extension of the term "employment" to the degree proposed by the Government and the inclusion not only of persons of doubtful status, but persons as well who have always been considered independent contractors,—in law and in practice,—on the basis that such persons are, as an economic fact, subject to the evils intended to be remedied, is more indicative of judicial legislation than of the interpretation of legislative intent. In any event it is not of immediate importance here what eventual outer boundaries are to be placed around the definition of the term employment. For here, the vendors were performing personal services constituting an integral part of the business operations of the employer, were not pursuing any separate trade business or pro-

fession involving capital outlay, the assumption of business risks, or the performance of like services to the public generally, and were subject to general control over the manner and means of performing their services. They were, therefore, employees within the statutory purport.

The decision of the Supreme Court in *National Labor Relations Board v. Hearst Publications*, *supra*, is not final judicial authority determining that the news vendors here are employees within the Social Security Statutes. The only positive holding in that case is that there was substantial evidence before the National Labor Relations Board to support the legal conclusion of that board establishing the employment relationship within the meaning of the National Labor Relations Act. Nevertheless, the decision here could fairly be made to rest on the results of the case before the Supreme Court. The facts in that case are not identical with those here presented, but their dissimilarity is not in material respects; the statute there interpreted is not the same as those here involved, but they are both of a kind. Although the Supreme Court did not uphold the findings of the National Labor Relations Act on the express basis that they were legally correct, its discourse admits of little doubt that the findings met with the Court's wholehearted approval*

*Although it has been said that the same persons might be employees for collective bargaining purposes and not employees within the Social Security laws (*Nevin, Inc. v. Rothensies*, *supra*) it hardly seems probable that Congress intended any such legal differentiation.

But because that case has the differences pointed out, the present case must be analyzed on its own facts, and the law applied thereto deduced from all competent legal precedents including those announced by the Supreme Court.

The publishers and vendors have, by their contract, attempted to establish a buyer-seller relationship between them. The contracts each recite such to be their intent. But the relationship of buyer and seller between them is entirely unrealistic. The publishers are not engaged in the wholesale business of selling newspapers to retailers, and the news vendors are not in any sense retail merchants [28] in the business of buying and selling merchandise. A newspaper is not, in fact, a commodity bought and sold as merchandise at all. It is the medium of disseminating information; it is the information which is sold and the publishers are the distributors and circulators of this information through the agency of their news vendors. Charging the vendors outright the "wholesale" price of papers delivered to them for sale, is referable more to an intent on the part of the publishers to impose a high degree of responsibility on the vendors for the care of the newspapers so delivered to them and for accuracy in accounting for the proceeds of the sales rather than to an intent to create a bona fide buyer-seller relationship. This is particularly so because as to papers returned unsold, the charge is offset by a corresponding credit. (See comment of Judge Denman in this regard in his dissenting opinion in the case of *Hearst Publications, Inc. v. National Labor*

Relations Board, 136 Fed. 2d 608, reversed, 322 U. S. 111.)

Even the California case of *New York Indemnity Company v. Industrial Accident Comm.* 213 Cal. 43, holding an injured news vendor to be beyond the coverage of the California Workmen's Compensation Act, admitted that news vendors were not independent contractors, but rather in the nature of sales agents.

Much emphasis is placed on the declared intent of the publishers and vendors to establish a buyer-seller relationship and not one of employer and employee. The plaintiffs point out that in the Restatement of the Law of Agency, one of the factors to be considered is "whether or not the parties believe they are creating the relationship of master and servant." But that belief must be a bona fide belief discernible from their actions and not based on declarations and the formality of contractual arrangements alone. (*Mateovich v. Anglim*, *supra*; also see *Pacific Lumber Co. v. Ind. Acc. Comm.* (1943) 22 Cal. 2d 410.) Here, nothing that was done functionally indicated a bona fide belief in the creation of a buyer-seller relationship. Furthermore the good faith of the parties' belief seems entirely irrelevant in this case. For it must be remembered that here the employment status of the vendors is important only to determine the applicability of the taxing provisions of the Social Security Statutes. Their applicability is not made to depend on the desires or beliefs of parties. Indeed, their efficacy would soon be impaired if such were the case. A

decision in favor of such status for that limited purpose does not infringe upon the parties' right of contract, or deny them the privilege of regarding themselves for any other purpose as buyer and sellers. But however they regard themselves and in whatever degree of good faith, they are nevertheless foreclosed from maintaining their status as buyers and sellers for the purpose of not being employers and employees within the Social Security Statutes if, within the meaning of those statutes the employment relationship is present. (*Griffith v. Commissioner*, 308 U.S. 355, 358).

The plaintiffs contend there is no employment relationship because "the vendor is free to sell his newspapers in the ways, methods and manner that he may see fit." (Opening statement of plaintiff's counsel.) That is, even regarding the vendor as an agent, the contention is made that he is nevertheless a free agent—responsible to his principal only for results. At common-law, such a person would not be considered an employee. (Restatement of the Law of Agency.) Whether or not this rule is eventually followed in interpreting the employment relationship in Social Security legislation is not of the moment.* Here there actually was at least a reasonable measure of general control exercised by the publisher over the manner in which the services of the vendors were performed. [29]

*In *Deecy Products Co. v. Welch*, *supra*, the court said: "... Congress does not intend a person to be considered an employee within the meaning of the Act unless he is subject to some sort of control and supervision."

*The publishers selected the vendors, designated their place, days and hours of service (within the limits agreed on by contracts) and fixed the profits they were to derive from the sale of each newspaper (although the profit, once fixed, remained constant for the period of the existing contract.) The vendors were expected to be at their corners at press release time, stay there for the sales period, be able to sell papers and take an interest in selling as many papers as they could. To see that they performed properly, they were kept under the surveillance of the publisher's employee, the "wholesaler." He was authorized to check in the vendor if the latter failed to so perform or to report any such infraction to the publisher, who could then discontinue further sales to the vendor, or report his conduct to the union for discipline by union agents. The vendor was required to sell his papers complete with sections in the order designated by the publisher and to display only newspapers on the stands or racks, which were furnished by the publishers at the latter's expense. The vendor incurred no expense or risks save that of having to pay for papers delivered him which by reason of loss or destruction he was unable to

*"A reasonable measure of direction and control over the method and means of performing the service is a constituent element of the relationship of master and servant, as distinguished from that of master and independent contractor, still the direction and control need not relate to every detail." *Jones v. Goodson*, 121 F. 2d 176.

return for credit. The vendors were not allowed to sell competitive newspapers without the publisher's consent. The plaintiff's seek to avoid the legal effect of these controls by explaining that they were not controls over the manner and means of performing the services at all (being that of selling newspapers) but merely the imposition of conditions of performance designed to effectuate the accomplishment of the desired results. It is claimed that in every independent contractual service relationship, such conditions are imposed to insure the success of the contract without transforming the relationship into one of employment. The plaintiffs thus invoke the principle that "where one is performing work in which another is interested the latter may exercise a certain measure of control for a definite and restricted purpose without acquiring the responsibilities of an employer." *Los Angeles Athletic Club v. U.S.* (D.C. Cal.) 54 F. Supp. 702, 706. This principle was followed in finding against an employment relationship with respect to newsboys in two California cases, *Bohanon v. James McClatchy-Publishing Co.* 16 Cal. App. 2d 188, and *New York Indemnity Co. v. Ind. Acc. Comm.* 213 Cal. 43. As to the former case, the employment relationship was there asserted to fix tort liability upon the publisher for the negligence of the newsboy. The court held that although the publisher did exercise some control over the activities of the newsboys, in other respects the latter had a free hand as to how he conducted his route and that in California "it is settled that the control which has

been adopted as the test by which the relationship between two persons is to be measured for the purpose of discovering whether such relationship is that of master and servant is complete and unqualified control." The rule of "complete control" announced in that case has not been followed even in California, in defining the employment relationship in remedial legislation. (*Twentieth Century Lites, Inc. v. California Department of Employment*, 28 A.C. 67, Apr. 1946; *Mateovich v. Anglim*, 134 F. 2d 834, 9th Cir.; *Grace v. Magruder*, 148 F. 2d 679.) In the case of *New York Indemnity Co. v. Ind. Acc. Comm.* *supra*, it is true that the court rejected the employment relationship within the meaning of the Workmen's Compensation Act in the case of a newsboy operating similarly to the news vendors here. It held that while the newsboy was not an independent contractor, he was nevertheless not an employee since there was lacking that degree of control over the manner and method of performing his duties by the publishers as would establish the employment relationship. Extensive analysis of that case for the purpose of distinguishing it from the present case is [30] unnecessary* for several reasons. First, federal courts are not bound by state court decisions in their interpretation of national Social Security legislation. (*National Labor Relations Board v. Hearst Publica-*

*For a discussion of the reasons for the reversal by the Cal. Sup. Ct. of its own decision, see note 32 Cal. Law Rev. No. 3, p. 289.

tions, *supra*.) Second, the decided federal cases indicate clearly a variance from the views there expressed, on the degree of control necessary to make out an employment relationship in remedial legislation. Third, the courts of California themselves have obviously drawn away from the tendency toward the restrictive and narrow application of common-law principles demonstrated by that case. (*Pacific Employers Insurance Company v. Ind. Acc. Comm.* 3 Cal. 2d 759; *Associated Indemnity Corp. v. Ind. Acc. Comm.* 128 C.A. 104 (1932). The rule is fairly well settled now that "employment" within the meaning of national remedial legislation, liberally construed, requires no more than a reasonable measure of control over the activities of the employee. What degree of control must be present depends upon the facts of each particular case.

Here, the vendors were subject to the publishers' control in every respect save the manner in which they personally offered the newspaper for sale to the public and collected the price. As to those features, lack of control is absent because of want of necessity for its presence. The witness, William Parrish, a news vendor, stated that in the sale of the newspapers, "it happens there is only one manner to do it." When the manner of performing the service is beyond another's control because of its nature, absence of direct control over such details becomes insignificant in the overall view of the facts and circumstances to be taken into account in determining the relationship. (*United States v. Vogue, Inc.* 145 F. 2d 609, *supra*.)

Here the news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publishers. In the performance of these services, they were subject to the general control of the publishers in every respect save where control was unimportant. In connection with their services they made no investment of capital, had no expenses and assumed no financial business risks, incidental to a separate trade, business or profession. They were, therefore, in employment with respect to which the taxes were properly imposed.

The plaintiffs stress certain pieces of evidence which they claim provide indicia of an independent-contractor relationship, namely, the lack of any right in the publishers to dismiss vendors without cause for the duration of the existing contract, the fact that the vendors provided their own transportation, filed no reports, attended no sales meetings, were not required to report to publishers' premises, have employed substitutes, and were privileged to and some actually sold non-competitive publications and other articles without the publishers' consent. These were at most details of this particular service relationship in operation. They did not alter the essential factors establishing, by their presence, the employment relationship, or change their character in context. (*National Labor Relations Board v. Hearst Publications, Inc.* 322 U.S. 111; *U.S. v. The Wholesale Oil Co. Inc.* 154 Fed. 2d 745; *Twentieth Century Lites Inc. v. Calif. Dept. of Employment*, 28 A.C. 67.) [31]

As to those selling other articles besides newspapers it does not appear that their relationship with the publishers was any different from other news vendors selling newspapers exclusively. The sale by them, therefore, of other articles did not, as to the newsvending, put them in the class of those performing such services incidental to the pursuit of a separately established business involving with respect to those services, capital investment and the assumption of substantial financial risk or the offering of similar services to the public at large.

Judgment will go for the defendant in all four cases upon findings of fact and conclusions of law to be presented in accordance with the rules.

Dated: December 31, 1946.

[Endorsed]: Filed Jan. 2, 1947.

[Title of District Court and Cause.]

DEFENDANT'S REQUEST FOR FINDINGS
OF FACT AND CONCLUSIONS OF LAW

The defendant respectfully requests the Court to enter the following findings of fact and conclusions of law attached hereto.

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

By /s/ WILLIAM E. LICKING,

Assistant United States

Attorney.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. One of the plaintiffs (hereinafter called the publishers), Chronicle Publishing Company, a California corporation, is the owner and publisher of the San Francisco Chronicle (hereinafter called the Chronicle), a daily morning and Sunday newspaper sold in San Francisco, California, and the vicinity. The other plaintiff, Hearst Publications, Inc., a California corporation, is the owner and publisher of two daily newspapers, the San Francisco Examiner (hereinafter called the Examiner), a daily morning and Sunday paper, and the San Francisco Call-Bulletin, a daily evening *and Sunday* newspaper, sold in San Francisco, California, and the vicinity.

2. Upon notice and demand of the Collector of Internal Revenue, the publishers paid under protest the taxes due under Titles VIII and IX of the Social Security Act, the Federal Unemployment Tax Act measured by the earnings of the news vendors selling their newspapers after April 1, 1937, and through the year 1940. Thereafter, the publishers filed claims for refund and brought these suits for the recovery of the amounts so paid on the ground that the news vendors were not their employees.

3. During 1938, 1939 and 1940, the Examiner was published and sold in four editions daily, and the Chronicle in five editions daily. A substantial portion of the publisher's circulation is effected through street sales by news vendors.

4. For sales by street news vendors, the publishers divided the city into a number of districts. With respect to the Examiner, the city was divided during 1937 to 1940 in districts ranging from ten to twenty. In the case of the Chronicle, the city was divided into eleven districts. Each of the districts contains a number of sales locations, ranging from twelve to thirty. An employee of the publisher called a "wholesaler" is assigned to each district. The Examiner employs approximately forty such "wholesalers."

5. The chief function of the wholesalers was to deliver the newspapers to the vendors at each edition time, survey their particular district between editions to see if more papers were needed at a particular sales location, or if surplus newspapers should be transferred to another such location, to collect from the news vendors for the papers sold, receive the return of unsold papers and give credit therefore.

6. Prior to August 31, 1937, the vendors were engaged by the publishers for the sale of their newspapers at particular corners or sales locations, without written agreement between them.

7. After August 31, 1937, the publishers engaged news vendors to sell newspapers at particular sales locations under the terms of the written contracts

in force after that date between the news vendors' union and the publishers either by oral agreement or by written agreement such as the following:

The undersigned Publisher (Publishers) and News Vendor hereby agree that said News Vendor shall sell at a (Full) (Part) Time Corner as designated by the Publisher (Publishers) in accordance with the terms of the contract between the San Francisco Newspaper Publisher's Association and the News Vendors' Union No. 20769, American Federation of Labor, dated

.....
Publisher.

.....
News Vendor.

8. The relationship between the news vendors and the publishers prior to August 31, 1937, was akin to that established by the succeeding written contracts in force after that date between the news vendors' union and the publishers, except as hereinafter indicated and for the exercise of a greater degree of control by the publishers over the activities of the vendors in matters which were thereafter settled by the terms of the contracts.

9. The first written contract between the publishers and the news vendors' union was executed on August 31, 1937, between the San Francisco Newspaper Publisher's Association as the representative of the publishers, including the plaintiffs, and Newspaper and Periodical Vendors' and Dis-

tributors Union No. 468, a labor union chartered by the American Federation of Labor, representing the news vendors. Successively two other contracts were negotiated in 1939 and 1940 which were similar in terms to the first contract.

10. The facts pertinent to the relationship between the publishers and the news vendors as fixed by the aforesaid written contracts and as appearing from their actual operations during the period here involved are these:

11. In each of the union contracts there was contained a clause declaring to be the intent of the parties to maintain the relationship of seller and buyer between the publishers and the news vendors and not an employer-employee relationship. (The clause was inserted at the insistence of the publishers, the vendors agreeing because their primary concern was their economic betterment.)

12. Prior to 1939, persons wishing to sell newspapers would apply directly to the publishers for assignment to any vacant sales location. After 1939, the union contracts required that the vendors be selected by the publishers from a list of available vendors furnished on request by the union.

13. The street sales locations were characterized as full time corners, part time corners, special event corners, and special wrapped edition corners. There were also "bootjackers" or roving vendors selling papers at large. Such locations were designated, limited, changed, discontinued or reestablished entirely at the publishers' discretion and in order to coincide with the changing public demand.

14. Prior to August 31, 1937, the services of the vendor were terminable at the will of the publisher. Thereafter, a vendor once engaged to sell at a particular location was entitled to man that location so long as it was maintained by the publisher, unless there should arise just cause for the discontinuance of further deliveries, such as drunkenness and failure to appear for work, or for his transfer from one location to another, in which event the publisher was entitled to effect such discontinuance or transfer. If a vendor felt that his contract to sell at a particular location had been discontinued by the publisher without cause he could have the matter submitted to and determined by arbitration.

15. The publishers fixed the so-called "retail" price at which the newspapers were to be sold publicly as well as the so-called "wholesale" price which was the amount payable to the publishers for all newspapers delivered to the news vendors which were not returned as unsold. Once fixed, such prices remained constant for the duration of the union contract then in force. The difference between the "wholesale" and "retail" price was the vendor's so-called "profit" or earnings. In addition, the news vendor was guaranteed a minimum weekly "profit."

16. The news vendor makes no payment for the newspapers at the time they are delivered to him for sale. He accounts for all the newspapers delivered either at the end of each edition or near the end of each day's sales period. At that time

he "checks in" or pays to the wholesaler the so-called "wholesale" price for the newspapers delivered to him which he does not return, receives full credit for all unsold newspapers which are returned, and keeps the difference between the amount paid and the amount received as his earnings.

17. Within certain limits prescribed by the union contracts, the publisher fixed for the various types of corners, the days and hours of sale which the publishers established to coincide with the news releases, the public's reading habits and its concentration at particular locations at particular periods.

18. As each edition left the press, the newspapers were delivered to the vendors at their corners by the wholesalers. The quantity delivered did not rest in the vendor's discretion but depended on what it was estimated the vendor, during the selling period, could dispose of at his location. Any disagreement as to the number of papers the vendor should take appeared to be a matter for settlement between the publisher and the union.

19. In their sales to the public, the vendors were required to sell complete newspapers only in such order as was designated by the publishers, and were not allowed to sell competitive newspapers without the publishers' consent. They were free to offer the papers for sale in the manner they saw fit, except that they were expected to be at their corners at press release time, to stay there during the sales period, to be able to sell papers and take an interest in selling them.

20. The manner in which the news vendors individually could offer the newspapers for sales to the public was so limited and of such nature as not to need control.

21. Prior to August 31, 1937, the wholesaler gave orders to the vendors in matters connected with the performance of their duties and disciplined them for failure to comply. Thereafter, the wholesalers kept the news vendors under their surveillance to see that they performed properly, observed their conduct, made suggestions and reported misfeasances to the publishers. In cases of misconduct of vendors warranting dismissal, the wholesaler could "check in" vendors before the end of the day's selling period or report the misfeasance to the publisher, who could then discontinue further deliveries to the vendor involved or report his conduct to the union agents for any disciplining short of discontinuance of deliveries to him.

22. The vendors had no expenses to bear and assumed no risks except the risk of the loss of papers delivered to them for sale and charged against them. They provided their own transportation to and from sales locations.

23. The vendors were not required to submit any form of report. There were no conferences or sales meetings which they were obliged to attend, nor was it necessary that they report to the publishers' premises for any purpose.

24. All advertising placards and display stands or racks were provided by the publishers and bore

the publisher's name. The vendors were forbidden to place anything on such stands or racks except newspapers.

25. The news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publishers.

26. The services performed by the news vendors were not incident to the pursuit of a separately established trade, business or profession of the news vendors, involving in their performance capital investment and the assumption of financial risk, or the offering of similar services to the public at large.

27. The services performed by the news vendors were subject to a reasonable measure of general control by the publishers over the manner and means of their performance.

Conclusions of Law

1. The services performed by the news vendors were performed in the "employment" of the plaintiffs within Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act, and the Federal Unemployment Tax Act.

2. The defendant is entitled to judgment dismissing the plaintiffs' complaint.

District Judge.

[Endorsed]: Lodged 1/28/47.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, subject to the approval of the Court, that plaintiffs may have to and including the 17th day of February, 1947, within which to propose objections and or amendments to proposed Findings of Fact lodged by the defendant in the above entitled action.

Dated: San Francisco, California, February 7, 1947.

/s/ GROVE J. FINK,

Attorney for Plaintiffs,

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ WILLIAM E. LICKING,

Assistant United States
Attorney.

So Ordered:

LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed Feb. 7, 1947.

[Title of District Court and Cause.]

PLAINTIFFS' OBJECTIONS AND SUGGESTION FOR AMENDMENTS AND ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs respectfully request the Court to consider the following objections and amendments and additions to Findings of Fact and Conclusions of Law on file herein:

Finding No. 1. Delete the words "and Sunday newspaper" page 1, line 25.

Finding No. 2. After the word "and" page 1, line 27, insert the words "the arbitrary." In line 28 after the word "taxes" insert the words "alleged to be."

Finding No. 9. Page 3 at line 23 insert a new sentence to read as follows:

"Thereafter two other contracts were negotiated in 1942 and 1944 and were likewise similar in terms to the first contract."

Finding No. 11. Strike out the entire sentence beginning with the words "the clause," page 4, line 1, and ending with the word "betterment" and in lieu thereof insert the following:

"The clause was suggested by the publishers and after consideration and negotiation the vendors agreed thereto."

Finding No. 12. On line 4, page 4, correct the date "1939" to read "1937" and correct the date "1939" page 4, line 6, to read "1937."

Delete the word "Union" on page 4, line 6.

Finding No. 13. Delete the word "characterized", page 4, line 9, and insert in lieu thereof the words "defined in the contracts."

Delete the word "entirely," page 4, line 13.

Delete the clause beginning with the word "and" and ending with the word "demand" in line 15, page 4.

Finding No. 15. Delete the word "publishers" page 4, line 28, and insert in lieu thereof the word "contracts."

Delete the word "so-called" in line 28 and in line 30 on page 4, and in line 4 on page 5.

Delete the word "union" page 5, line 2.

After the word "guaranteed," page 5, line 5, insert the words "under the terms of the contract."

Finding No. 16. Page 5, line 6, introduce the finding by a sentence to read as follows:

"The method of payment by the newspaper vendor for the papers delivered to him is provided for by the contract and is as generally hereinafter described."

Delete the words "so-called," page 5, line 10.

Finding No. 17. Delete the word "certain," page 5, line 15, and insert the word "the".

Delete the word "union", page 5, line 15.

Finding No. 18. Delete the words "did not rest", page 5, line 22, and insert in lieu thereof the word "rested".

Delete the word "but", page 5, line 22, and insert in lieu thereof the word "and".

Delete the words "it was estimated", page 5, line 23, and after the word "vendedor", page 5, line 23, insert the words "estimated he could sell".

After the word "period", page 5, line 24, delete the words "could dispose of".

Delete the entire sentence beginning with the word "any", page 5, line 24, and ending with the word "union" page 5, line 26.

Finding No. 19. After the word "public", page 5, line 27, insert the words "the contract provided that".

Delete the word "required", page 5, line 28.

Finding No. 20. Delete the entire finding beginning with the word "The" page 6, line 4, and ending with the word "control", page 6, line 5.

Finding No. 21. Delete the words "warranting dismissal", page 6, line 13, and insert in lieu thereof the following: "amounting to breach of the contract".

Finding No. 22. Delete the words beginning with the word "no", page 6, line 18, and ending with the word "except" page 6, line 19.

Delete the period following the word "then", page 6, line 20, and insert the words "and all losses by reason of their credit selling of newspapers."

Finding No. 24. Delete the word "all" page 6, line 26, [44] and insert the word "such".

Delete the word "forbidden" page 6, line 28, and insert the words "requested not".

Finding No. 25. Delete the entire finding page 7, lines one to three, inclusive, and in lieu thereof insert a new finding to read as follows:

“The news vendors were engaged as a means of livelihood in selling at their various locations single copies of newspapers to the public at the retail price fixed by the contract which said newspapers they purchased from the publisher at the wholesale price fixed by the contract.”

Finding No. 26. Delete the entire finding as proposed, page 7, lines 4 to 9, inclusive, and insert in lieu thereof the following:

“The activities performed by the news vendors constituted incidents of a separately established trade or business of the news vendors involving in their performance capital investment and the assumption of financial risk, which said activities were offered and available to and utilized by the publishers of other publications and the producers and distributors of various and sundry articles.”

Finding No. 27. Delete the entire finding beginning with the word “the”, page 7, line 10, and ending with the word “performance”, page 7, line 12, and insert in lieu thereof the following:

“The activities of the news vendors were subject to control by the publishers only as provided in the contract.”

Add a new finding to be numbered Finding 28 to read as follows:

“The publishers make no retail sales of newspapers whatsoever and make no delivery of single copies to the public other than through mail subscriptions. Newspapers are sold by the publishers to the news vendors and various other sales outlets at a wholesale rate or price per hundred copies.” [45]

Add a new finding to be numbered Finding 29 to read as follows:

“The news vendors are free to and do sell publications other than the newspapers published by the publishers and are free to and do sell other articles.”

Dated: San Francisco, California, February 17, 1947.

FINK & KEYSTON,
By GROVE J. FINK.

Receipt of a copy of the foregoing Plaintiffs Objections and Suggestions for Amendments and Additions to Findings of Fact and Conclusions of Law is hereby acknowledged this 17th day of February, 1947.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant United States
Attorney.

[Endorsed]: Filed Feb. 18. 1947. [46]

[Title of District Court and Cause.]

ORDER SETTLING FINDINGS OF FACT
AND CONCLUSIONS OF LAW

It is Ordered, that defendant's proposed Findings of Fact and Conclusions of Law are adopted subject to the following modifications, amendments and additions:

(1) From Finding No. 1, at page 1, line 25, delete [47] the words "and Sunday."

(2) To finding No. 9, at the end thereof, add the following sentence:

"Thereafter two other contracts were negotiated in 1942 and 1944 and were likewise similar in terms to the first contract."

(3) From finding No. 13, delete the word "characterized" page 4, line 9, and insert in lieu thereof the words "defined in the contracts."

(4) To finding No. 15, after the word "guaranteed," page 5, line 5, insert the words "under the terms of the contract."

(5) From finding No. 17, delete the word "certain," page 5, line 15, and insert in lieu thereof the word "the."

(6) From finding No. 22, delete the period following the word "them" page 6, line 20, and insert the words "and all losses by reason of their credit selling of newspapers, if any."

(7) Amend finding No. 26 to read as follows:

“The vendors were not prohibited from selling non-competitive publications and articles of personal property, and some so did. Nevertheless, as to the services performed by the news vendors for the publishers, the same were not incident to the pursuit of a separately established trade, business or profession of the news vendors, involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar service to the public at large.”

Let the findings be engrossed accordingly.

Dated: February 26, 1947.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Feb. 27, 1947. [48]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. One of the plaintiffs (hereinafter called the publishers), Chronicle Publishing Company, a California corporation, is the owner and publisher of the San Francisco Chronicle (hereinafter called the Chronicle), a daily morning and Sunday newspaper sold in San Francisco, California, and the

vicinity. The other plaintiff, Hearst Publications, Inc., a California corporation, is the owner and publisher of two daily newspapers, the San Francisco Examiner (hereinafter called the Examiner), a daily morning and Sunday paper, and the San Francisco Call-Bulletin, a daily evening newspaper, sold in San Francisco, California, and the vicinity.

2. Upon notice and demand of the Collector of Internal Revenue, the publishers paid under protest the taxes due under Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act, the Federal Unemployment Tax Act measured by the earnings of the news vendors selling their newspapers after April 1, 1937, and through the year 1940. Thereafter, the publishers filed claims for refund and brought these suits for the recovery of the amounts so paid on the ground that the news vendors were not their employees.

3. During 1938, 1939 and 1940, the Examiner was published and sold in four editions daily, and the Chronicle in five editions daily. A substantial portion of the publisher's circulation is effected through street sales by news vendors.

4. For sales by street news vendors, the publishers divided the city into a number of districts. With respect to the Examiner, the city was divided during 1937 to 1940 in districts ranging from ten to twenty. In the case of the Chronicle, the city was divided into eleven districts. Each of the districts contains a number of sales locations, ranging

from twelve to thirty. An employee of the publisher called a "wholesaler" is assigned to each district. The Examiner employs approximately forty such "wholesalers."

5. The chief function of the wholesalers was to deliver the newspapers to the vendors at each edition time, survey their particular district between editions to see if more papers were needed at a particular sales location, or if surplus newspapers should be transferred to another such location, to collect from the news vendors for the papers sold, receive the return of unsold papers and give credit therefore.

6. Prior to August 31, 1937, the vendors were engaged by the publishers for the sale of their newspapers at particular corners or sales locations, without written agreement between them.

7. After August 31, 1937, the publishers engaged news vendors to sell newspapers at particular sales locations under the terms of the written contracts in force after that date between the news vendors' union and the publishers either by oral agreement or by written agreement such as the following:

The undersigned Publisher (Publishers) and News Vendor hereby agree that said News Vendor shall sell at a (Full) (Part) Time Corner as designated by the Publisher (Publishers) in accordance with the terms of the contract between the San Francisco Newspaper Publisher's Association and

the News Vendors' Union No. 20769, American Federation of Labor, dated

.....
Publisher.

.....
News Vendor.

8. The relationship between the news vendors and the publishers prior to August 31, 1937, was akin to that established by the succeeding written contracts in force after that date between the news vendors' union and the publishers, except as hereinafter indicated and for the exercise of a greater degree of control by the publishers over the activities of the vendors in matters which were thereafter settled by the terms of the contracts.

9. The first written contract between the publishers and the news vendors' union was executed on August 31, 1937, between the San Francisco Newspaper Publisher's Association as the representative of the publishers, including the plaintiffs, and Newspaper and Periodical Vendors' and Distributors' Union No. 468, a labor union chartered by the American Federation of Labor, representing the news vendors. Successively two other contracts were negotiated in 1939 and 1940 which were similar in terms to the first contract. Thereafter two other contracts were negotiated in 1942 and 1944 and were likewise similar in terms to the first contract.

10. The facts pertinent to the relationship between the publishers and the news vendors as fixed by the aforesaid written contracts and as appear-

ing from their actual operations during the period here involved are these:

11. In each of the union contracts there was contained a clause declaring to be the intent of the parties to maintain the relationship of seller and buyer between the publishers and the news vendors and not an employer-employee relationship. The clause was inserted at the insistence of the publishers, the vendors agreeing because their primary concern was their economic betterment.

12. Prior to 1939, persons wishing to sell newspapers would apply directly to the publishers for assignment to any vacant sales location. After 1939, the union contracts required that the vendors be selected by the publishers from a list of available vendors furnished on request by the union.

13. The street sales locations were defined in the contracts as full time corners, part time corners, special event corners, and special wrapped edition corners. There were also "bootjackers" or roving vendors selling papers at large. Such locations were designated, limited, changed, discontinued or re-established entirely at the publishers' direction and in order to coincide with the changing public demand.

14. Prior to August 31, 1937, the services of the vendor were terminable at the will of the publisher. Thereafter, a vendor once engaged to sell at a particular location was entitled to man that location so long as it was maintained by the publisher, unless there should arise just cause for the discontinuance of further deliveries, such as drunkenness and failure to appear for work, or

for his transfer from one location to another, in which event the publisher was entitled to effect such discontinuance or transfer. If a vendor felt that his contract to sell at a particular location had been discontinued by the publisher without cause he could have the matter submitted to and determined by arbitration.

15. The publishers fixed the so-called "retail" price at which the newspapers were to be sold publicly as well as the so-called "wholesale" price which was the amount payable to the publishers for all newspapers delivered to the news vendors which were not returned as unsold. Once fixed, such prices remained constant for the duration of the union contract then in force. The difference between the "wholesale" and "retail" price was the vendor's so-called "profit" or earnings. In addition, the news vendor was guaranteed under the terms of the contract a minimum weekly "profit."

16. The news vendor makes no payment for the newspapers at the time they are delivered to him for sale. He accounts for all the newspapers delivered either at the end of each edition or near the end of each day's period. At that time he "checks in" or pays to the wholesaler the so-called "wholesale" price for the newspapers delivered to him which he does not return, receives full credit for all unsold newspapers which are returned, and keeps the difference between the amount paid and the amount received as his earnings.

17. Within the limits prescribed by the union contracts, the publishers fixed for the various

types of corners, the days and hours of sale which the publishers established to coincide with the news releases, the public's reading habits and its concentration at particular locations at particular periods.

18. As each edition left the press, the newspapers were delivered to the vendors at their corners by the wholesalers. The quantity delivered did not rest in the vendor's discretion but depended on what it was estimated the vendor, during the selling period, could dispose of at his location. Any disagreement as to the number of papers the vendor should take appeared to be a matter for settlement between the publisher and the union.

19. In their sales to the public, the vendors were required to sell complete newspapers only in such order as was designated by the publishers, and were not allowed to sell competitive newspapers without the publishers' consent. They were free to offer the papers for sale in the manner they saw fit, except that they were expected to be at their corners at press release time, to stay there during the sales period, to be able to sell papers and take an interest in selling them.

20. The manner in which the news vendors individually could offer the newspapers for sales to the public was so limited and of such nature as not to need control.

21. Prior to August 31, 1937, the wholesaler gave orders to the vendors in matters connected with the performance of their duties and disciplined them for failure to comply. Thereafter, the

wholesalers kept the news vendors under their surveillance to see that they performed properly, observed their conduct, made suggestions and reported misfeasances to the publishers. In cases of misconduct of vendors warranting dismissal, the wholesaler could "check in" vendors before the end of the day's selling period or report the misfeasance to the publisher, who could then discontinue further deliveries to the vendor involved or report his conduct to the union agents for any disciplining short of discontinuance of deliveries to him.

22. The vendors had no expenses to bear and assumed no risks except the risk of the loss of papers delivered to them for sale and charged against them and all losses by reason of their credit selling of newspapers, if any. They provided their own transportation to and from sales locations.

23. The vendors were not required to submit any form of report. There were no conferences or sales meetings which they were obliged to attend, nor was it necessary that they report to the publishers' premises for any purpose.

24. All advertising placards and display stands or racks were provided by the publishers and bore the publisher's name. The vendors were forbidden to place anything on such stands or racks except newspapers.

25. The news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publishers.

26. The vendors were not prohibited from selling non-competitive publications and articles of

personal property, and some so did. Nevertheless, as to the services performed by the news vendors for the publishers, the same were not incident to the pursuit of a separately established trade, business or profession of the news vendors, involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large.

27. The services performed by the news vendors were subject to a reasonable measure of general control by the publishers over the manner and means of their performance.

Conclusions of Law

1. The services performed by the news vendors were performed in the "employment" of the plaintiffs within Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act, and the Federal Unemployment Tax Act.

2. The defendant is entitled to judgment dismissing the plaintiffs' complaint.

LOUIS E. GOODMAN,

United States District Judge.

The above findings submitted following the Court's order of February 26, 1947.

/s/ FRANK J. HENNESSY,

United States Attorney.

By W. E. LICKING,

Asst. U. S. Atty.

Dated April 28th, 1947.

[Endersd]: Filed April 29, 1947. [56]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25228-G

HEARST PUBLICATIONS, INCORPORATED, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause coming on for trial, both parties appearing by counsel, and having been submitted to the court for trial without a jury and the court now here after hearing all the evidence adduced and being fully advised in the premises, and having made its findings of fact and conclusions of law, finds the issues for the defendant.

Therefore, it is hereby ordered, adjudged and decreed that the plaintiff take nothing; that the action be and it is hereby dismissed on the merits; that the defendant have and recover from the plaintiff its costs in the action. and that the defendant have execution therefor.

Dated April 28th, 1947.

LOUIS E. GOODMAN,
District Judge.

[Endorsed]: Lodged 2/17/47. Filed and entered
April 29, 1947. [57]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Tuesday, the 29th day of April, in the year of
our Lord one thousand nine hundred and forty-
seven.

Present: The Honorable Louis E. Goodman,
District Judge.

Civ. No. 25230-G, The Chronicle Publishing Co.,
etc., vs. United States;

Civ. No. 25231-G, The Chronicle Publishing Co.,
etc., vs. United States;

Civ. No. 25228-G, Hearst Publications, Inc., etc.,
vs. United States;

Civ. No. 25229-G, Hearst Publications, Inc., etc.,
vs. United States.

Minute Order April 29, 1947

ORDER THAT ENGROSSED FINDINGS AND
JUDGMENTS BE FILED AND ENTERED

These cases heretofore having been tried before
the Court sitting without a jury, and the Court
having found in favor of the defendant upon find-
ings of fact and conclusions of law and the defend-
ant having submitted proposed findings and the
plaintiffs having submitted proposed amendments
thereto, and the Court thereafter having ordered

the proposed findings submitted by the defendant engrossed, and the proposed findings thereafter having been engrossed, it is Ordered that said engrossed findings and the judgments herein be filed and entered in the form presented and signed. [58]

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 25228-G

HEARST PUBLICATIONS, INCORPORATED, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR LEAVE TO ENTER APPEARANCE OF ADDITIONAL ATTORNEYS
FOR PLAINTIFF

Plaintiff moves the court to enter an order permitting Reginald H. Linforth and James I. Johnson to file their appearance as additional attorneys for the plaintiff.

GROVE J. FINK,

FINK & KEYSTON,

By /s/ GROVE J. FINK,

Attorneys for Plaintiff.

Consent to Entry of Order

Consent is hereby given to the entry of the order requested in the foregoing motion, without notice,

Dated July 11, 1947.

/s/ FRANK J. HENNESSY,

Attorney for Defendant.

By C. ELMER COLLETT,

Asst. U. S. Attorney.

[Endorsed]: Filed July 14, 1947. [59]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO ENTER
APPEARANCES

On motion of plaintiff, and pursuant to the consent of defendant, leave is hereby granted Reginald H. Linforth and James I. Johnson to file their respective appearances in the above entitled action as additional attorneys for plaintiff therein.

Dated July 14, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed July 14, 1947. [60]

[Title of District Court and Cause.]

APPEARANCES

The undersigned, Reginald H. Linforth and James I. Johnson, in pursuance of an order of the above entitled court, granting them leave so to do, hereby enter their respective appearances as additional attorneys for plaintiff in the above entitled action.

Dated July 14, 1947.

/s/ REGINALD H. LINFORTH,
910 Crocker Building,
San Francisco, California,
Sutter 4815.

/s/ JAMES I. JOHNSON,
910 Crocker Building,
San Francisco, California,
Sutter 4815.

[Endorsed]: Filed July 14, 1947. [61]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Hearst Publications, Incorporated, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947.

GROVE J. FINK,
FINK & KEYSTON,

By GROVE J.FINK.

REGINALD H. LINFORTH,
JAMES I. JOHNSON,

Attorneys for appellant
Hearst Publications,
Incorporated.

Of Counsel:

CALKINS, HALL, LINFORTH &
CONARD.

[Endorsed]: Filed July 21, 1947. [62]

[Title of District Court and Cause.]

COST BOND ON APPEAL

The premium on this bond is \$10 per annum.

Whereas, the plaintiff in the above entitled action is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment entered against it in said action in the District Court of the United States, for the Northern District of California, Southern Division, in favor of the defendant in said action, on the 29th day of April, 1947.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against it on the appeal on on a [63] dismissal thereof not exceeding the sum of \$250.00, to which amount it acknowledges itself bound.

In Witness Whereof the corporate seal and name of the said surety company is hereto affixed and attested at San Francisco, California, by its duly authorized officer this 18th day of July, 1947.

In case of a breach of any condition hereof the above entitled court may, upon notice to said Maryland Casualty Company, surety hereunder, of not less than ten days, proceed summarily in the above

entitled action or proceeding to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment against said surety and award execution therefor.

[Seal] MARYLAND CASUALTY
COMPANY,

By /s/ H. M. VREELAND, JR.,
Attorney in Fact.

[Endorsed]: Filed July 21, 1947. [64]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF THE
TIME FOR FILING THE RECORD ON
APPEAL AND DOCKETING THE ACTION

It Is Hereby Stipulated by and between the parties hereto, through their respective attorneys of record:

That an order may be entered extending the time for filing the record on appeal and docketing the action on the appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947, notice of which appeal has been filed by plaintiff.

. Dated August 20, 1947.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY,

Attorney for Defendant.

[Endorsed]: Filed Aug. 21, 1947. [65]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE THE
RECORD ON APPEAL AND DOCKET
THE ACTION ON APPEAL

Pursuant to the stipulation of the parties hereto, it is hereby ordered that the time for filing the record on appeal and docketing the action on the appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947, notice of which appeal has been filed by plaintiff, be, and the same hereby is, extended to and including October 18, 1947.

Dated August 21st, 1947.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Aug. 21, 1947. [66]

[Title of District Court and Cause.]

WITHDRAWAL OF ATTORNEYS

Whereas, Grove J. Fink, of the firm of Fink & Keyston, died on the 23rd day of July, 1947, said firm, with the consent of plaintiff appended hereto, hereby withdraws as attorneys for plaintiff in the above entitled action.

Dated August 19, 1947.

FINK & KEYSTON,
By /s/ GARTON D. KEYSTON.

Consent to Withdrawal

Hearst Publications, Incorporated, hereby consents to the withdrawal of Fink & Keyston as its attorneys in the above entitled action, leaving Reginald H. Linforth and James I. Johnson as its sole attorneys in said action.

Dated August 19, 1947.

HEARST PUBLICATIONS,
INCORPORATED,
By /s/ CLARENCE LINDNER.

[Endorsed]: Filed Aug. 21, 1947. [67]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO WITHDRAW
AS ATTORNEYS

Pursuant to the consent of plaintiff filed herein, leave is hereby given to Messrs. Fink & Keyston to withdraw as attorneys for the plaintiff in the above entitled action.

Dated August 21st, 1947.

LOUIS E. GOODMAN,
U. S. District Judge.

Consent is hereby given to the granting of the foregoing order without notice.

/s/ FRANK J. HENNESSY,
Attorney for Defendant.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 21, 1947. [68]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON
WHICH APPELLANT INTENDS TO
RELY UPON APPEAL

Appellant intends to rely upon each of the following points:

1. The court erred in holding that the news vendors involved were employees of plaintiff and were not independent contractors.

2. The court erred in the findings of fact upon which its decision was based.

3. The court erred in its conclusions of law.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Appellant.

Received a true copy of the foregoing this 24th day of September, 1947.

WILLIAM E. LICKING,

Asst. U. S. Atty.,

Attorney for Appellee.

[Endorsed]: Filed Sept. 24, 1947. [69]

[Title of District Court and Cause.]

STIPULATION AS TO THE RECORD
ON APPEAL

It is hereby stipulated by and between the parties hereto, through their respective attorneys of record:

1. That the following are designated as the parts of the record, proceedings and evidence to be included in the record on appeal:

(a) The complaint.

(b) The summons.

(c) The answer to the complaint.

(d) Order relative to consolidation and setting case for trial on March 28, 1946, entered January 28, 1946.

(e) Motion for judgment on pleadings filed March 22, 1946.

(f) Order consolidating for trial cases Nos. 25228, 25229, 25230, and 25231, entered March 28, 1946. [70]

(g) Motion for judgment, filed April 2, 1946.

(h) A complete transcript of all the evidence and proceedings.

(i) All exhibits identified, offered or introduced in evidence, being plaintiff's Exhibits Nos. 1 through 53, both inclusive, and Defendant's Exhibits A through Z, both inclusive, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ.

(j) Order submitting case, entered July 29, 1946.

(k) Order that judgment be for defendant upon findings to be presented, entered January 2, 1947.

(l) Opinion, filed January 2, 1947.

(m) Defendant's request for findings, filed January 28, 1947.

(n) Stipulation extending time to file objections, amendments and additions to findings, filed February 7, 1947.

(o) Plaintiff's objections and suggestions for amendments and additions to findings, filed February 18, 1947.

(p) Order settling findings of fact and conclusions of law, filed February 27, 1947.

(q) Findings, filed April 29, 1947.

(r) Judgment, filed April 29, 1947, together with order that findings and judgment be entered and filed, entered April 29, 1947.

(s) Motion relative to appearances, filed July 14, 1947.

(t) Order permitting additional appearances, filed July 14, 1947.

(u) Appearance of Reginald H. Linforth and James I. Johnson, filed July 14, 1947.

(v) Notice of Appeal, filed July 21, 1947.

(w) Cost of Bond on Appeal, filed July 21, 1947.

(x) Withdrawal of Attorneys, filed August 21, 1947.

(y) Order Granting Leave to Fink & Keyston to Withdraw as Attorneys, filed August 21, 1947.

(z) Stipulation, filed August 21, 1947.

(aa) Order Extending Time to File Record on Appeal and Docket the Action, filed August 21, 1947. [71]

(bb) Statement of Points on which Appellant Intends to Rely Upon Appeal.

(cc) This Stipulation as to the Record on Appeal.

2. That the original exhibits may be sent up to the Circuit Court of Appeals as a part of the record. instead of copies thereof.

3. That the certified copy of the transcript of the evidence and proceedings, filed with the Clerk of the United States District Court in the above case, shall be transmitted as a part of the record on appeal, and that additional copies thereof need not be filed by appellant.

Dated September 18, 1947.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY.

U. S. Attorney,

/s/ W. E. LICKING,

Asst. U. S. Atty.,

Attorney for Defendant.

[Endorsed]: Filed Sept. 24, 1947. [72]

[Title of District Court and Cause.]

ORDER ENLARGING THE TIME IN WHICH
TO FILE THE RECORD ON APPEAL

On motion of appellant, and for good cause shown, the time in which the appellant may file the record on appeal and docket the section on appeal in the above-entitled case, numbered 25228-G in the District Court of the United States for the Northern District of California, Southern Division, is hereby extended to and including November 18, 1947.

Dated this 16th day of October, 1947.

WILLIAM DENMAN,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

A true copy. Attest: Oct. 16, 1947.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Oct. 16, 1947. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Oct. 17, 1947. C. W. Calbreath, Clerk. [73]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 73 pages, numbered from 1 to 73, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Hearst Publications, Incorporated, a corporation, Plaintiff, vs. United States of America, Defendant, No. 25228-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$10.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of November, A. D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk. [74]

In the United States District Court, for the
Northern District of California, Southern
Division

Nos. 25228-9

HEARST PUBLICATIONS, INCORPORATED, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Nos. 25230-1

THE CHRONICLE PUBLISHING COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT

Consolidated

Appearances:

For the Plaintiffs, Grove J. Fink, Esquire.

For the Defendants, Arthur L. Jacobs, Esquire,
Special Assistant to the Attorney General of the
United States, and William Licking, Esquire, As-
sistant United States Attorney.

Amicus Curiae, S. A. Ladar, appearing on behalf
of Newspaper and Periodical Vendors Union.

Clarence A. Linn, Esquire, appearing on behalf of
the Attorney General of the State of California. [1*]

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

The Court: Do you wish to make an opening statement?

Mr. Fink: Yes, your Honor, I desire to. I desire to take a recess first.

The Court: Would you prefer that?

Mr. Fink: I would prefer that.

(Recess.)

Mr. Fink: May it please the Court, you have already been advised as to the statutes under which the complaints of the causes have arisen. The complaints, I want to assure the Court, are not quite so formidable as they appear, because attached to the complaints are numerous exhibits, each and every one of which is admitted to be a true copy, and there is no controversy as to them.

The Federal Insurance Contributions Act complaint of the Hearst Publications, Inc., contains nine counts and covers periods beginning with April 1st, 1937, covering the period of time until December 31, 1940. Those respective counts were necessary because under the Act the newspapers, The Examiner and The San Francisco Call-Bulletin, are assessed quarterly. Under the Unemployment Insurance Tax Act, or the Unemployment Tax Act, the Hearst Publications' complaints contain but three counts and covers a period beginning with January 1st, 1937, for the entire year of 1938 and the calendar year 1940, there being no assessment for the year 1939.

The Chronicle's complaints are identical with the Hearst [2] Publications' complaints, both in contents and in number of counts.

The allegations of the complaints are largely admitted. The corporate existence of the respective plaintiffs, the publication, the statutes, the circulation and retail sales on the streets of San Francisco of the various newspapers is admitted; the type of action, the issuance of assessments and notices by the collectors, the demand for payment of tax, the payment of tax under protest and with appropriate claim for refund, the disallowance of the claims in accordance with the Internal Revenue Bureau procedure and such is admitted; and, notably, the contract to which reference has been made, which is attached as Exhibit 4, is admitted as a true copy.

The contract is one between the San Francisco Newspaper Publishers Association, and the News Vendors Union in San Francisco.

Now, the answer denies all the following allegations. We assert in our complaint a definition of the term "News Vendors" which they deny. It is denied that papers are purchased at wholesale and sold at retail on the streets of San Francisco and that the profit to the news vendors is the difference between the wholesale and retail price. The organization of the news vendors and the negotiations and execution of the contract of August 31, 1937, is denied, as is the intent to establish a buyer and seller, independent contractor relationship. [3] They deny that construction of the contract. We have pleaded in the complaints, if your Honor please, four subsequent contracts which were executed in 1939, 1940, 1942 and 1944, between the same per-

sons, the same parties. That denial, I understand, is merely a formal denial, because that paragraph contains some other allegations.

I understand there is an admission that the four contracts were signed and that the copies which will be introduced are true copies. However, they do deny, for technical reasons I suppose, those four subsequent contracts. The intent of the parties in the four subsequent contracts is denied. By that denial, they deny that the intent in the four subsequent contracts was to establish a buyer-seller independent contract relationship. They deny that the street vendors are not employees. They deny that they are independent contractors, and they deny that the plaintiff exercises no control over the vendors or that the plaintiff has no right to control. They make formal denials in connection with the payment of the tax, the liability for the tax.

Now, the pleadings, if your Honor please, as thus very briefly described, present a clean-cut and clear-cut issue. There is only one issue in the case, that is, the status of the news vendors who sell newspapers on the streets of San Francisco. It is the contention of the plaintiff, and we will prove, that these vendors have operated under the system under which they are now operating, long before the enactment of the Social Security Act and the Unemployment Insurance Act, and always have been buyers of newspapers at wholesale rates and that they have always sold those newspapers upon the streets of San Francisco at a retail rate. The relationship as between the parties prior to and after the enact-

ment of the Federal statute has been that of buyer-seller and that the news vendors are, in fact, independent contractors. We contend, of course, that there is no liability for the tax; that it has been paid and having been paid and appropriate claims for refund having been filed and disallowed, that the Government should make the refunds.

Of course newspapers are distributed by a contract system, if it please the Court, but we are concerned only and solely with the one type of newspaper distribution in this case, and that is the distribution by the street corner vendors who sell you your paper at night when you start for your train or home, or in the morning on your way to work. We will show that in 1937 the vendors, for reasons of their own with which I am not concerned, formed an organization and affiliated with the American Federation of Labor and thereafter approached the publishers of San Francisco, seeking a contract with the publishers for the sale on the streets of San Francisco of the newspapers purchased by members of their organization. We will show that the publishers agreed to negotiate with the Vendors' [5] Union and those negotiations opened in the month of June, early in the month of June 1937. We will show that at the very opening, the very beginning of those negotiations, the question as to the status of the Vendors' Union and the individual arose and that as a result of that question arising that early, it was decided by both parties that the negotiations would proceed upon only one basis, to wit, that of the continuation of the

buyer-seller relationship. It will appear as the evidence in the case progresses that the intent of the parties in opening negotiations in 1937 was expressed in a paragraph of the contract, Paragraph I, which declared it to be the intent of both parties to establish the buyer-seller, independent contractor relationship, and contained another provision that the parties would not construe any part of the contract as being anything else; and it will be shown that that particular provision of the contract, Section 1, was carried through, not only in the first but the four succeeding contracts, making five contracts in all, arms-length negotiation in which the intent of the parties was expressed. I might say, parenthetically, that I recognize as well as anybody else that as a matter of law you cannot, by declaration, make a document something it is not. But I do say to the Court that when the parties have, through five successive contracts, expressed their intent, that weight must be given to that expression of intent. We will cover the matter of the construction of the contract, the 1937 contract, by the parties and will show to the Court that the parties in their dealings with each other construed and intended that contract directly in accordance with the expressed intent. The course of the testimony will show that newspapers, in these particular methods of distribution, are delivered to the vendors by individual employees of the publishers, who are called "Wholesalers." These wholesalers distribute from the publishers' plants as rapidly as possible to the individual vendors, the several editions of the paper,

and the evidence will show that the individual vendor is given such number of papers as he, the vendor, may order. At that point, the evidence will show that the contract of the publisher with the vendor ceases until it comes time for the vendor to pay for the papers which he has taken from the publisher. No employee of the publisher thereafter contacts the vendor, and the vendor is free to sell his newspapers in the ways, method and manner that he may see fit.

We will present evidence to show that, applying the common law test, there is no control, no right of control by the publishers over the vendors. In fact, the evidence will probably go to a greater point than that. It will probably show that if there is any control by any party, the control is entirely on the part of the Vendors' Union over their own men and not control by the publishers over the vendors. [7]

A matter which I think may need a moment of explanation, your Honor, is a matter that is bound to arise, and it is this: In the complaint. Exhibit 4, is a contract between a publishers association and the News Vendors' Union. Under the terms, it is what might be called a master contract. Under the terms of that contract, standing alone, not one single newspaper would reach the streets of San Francisco for sale, not one single newspaper put out by any of the three publishers in San Francisco would ever reach the streets. The master contract provides for another and separate contract, which the evidence will show is made as between the publisher and the individual vendors, and it is that contract which we

contend, subject of course to a review of the master contract, must be interpreted by this Court. Each publisher enters into these separate contracts. He may contract with John Brown for a period of time, and later contract with John Smith for the same sales output. And these contracts are the ones, it is our contention, are the ones upon which we must have a judicial determination.

During the early course of the trial, I apprehend that there will be some question of law arise, which normally I assume would not properly be mentioned in an opening statement. However, I want to state briefly the position which we take and state to the Court the position which I apprehend the Government will take. We urge upon the Court and will throughout the trial urge upon the Court that the common law contract of the [8] relationship between these parties must be applied. In other words, using the well-known test, the right of control, the actual control and the right to control, we believe are the determining tests.

We state to the Court that the position of the Government will ultimately be that we must follow the doctrine that it is the mischief to be corrected, and so on, the social economic doctrine of the so-called Hearst case, decided by the Supreme Court. We will further show to the Court during the course of the trial that our position on the law is justified, not only justified but is a matter entirely free from doubt by the regulations of the very departments which are now opposing these causes.

I think, if your Honor please, with this very brief statement, I am ready to proceed.

The Court: Do you wish to make a statement?

Mr. Jacobs: If you please.

May it please the Court, I would restate the question somewhat different than Mr. Fink. We believe the question before this Court, the only question before this Court, is whether the street vendors engaged in the sale of the plaintiffs' newspapers under the terms and conditions of the union contract, which is an exhibit to the complaint, are employees within the meaning of the Social Security Act. At the outset, as I tried to make clear on the motion for judgment, we believe that this [9] union contract embodies all of the terms and conditions, all of the right and obligations between the parties, the parties being the San Francisco Publishers Association, as well as the plaintiffs, the publishers, on the one hand, and the union on the other. That contract, and the provisions of that contract are incorporated by reference in the contract between the publishers and the individual vendors under the form of contract which is also attached as an exhibit to the complaint. Now, with respect to that contract, we say we think it is a complete contract. It is our position that no evidence is permissible to explain or in any way indicate the negotiations leading up to the contract. So far as the contract is not ambiguous and unequivocal, it speaks for itself. Further, we submit that no evidence is admissible to show the exercise or non-exercise of any powers conferred in that contract, because it is the existence of the power, not the exercise of the power, that is important.

Third, with respect to the contract, it is our position that no evidence is admissible to alter or vary the terms of that contract.

Now, with respect to the question of employees, the interpretation of the word "employee," since there is no statutory definition, it is our position that the term "employee" as used in the Social Security Act is not to be interpreted in a common law sense, as Counsel for the [10] plaintiffs contends. It is to be interpreted in light of the legislative purpose and there is authority which supports the Government's position. In any event, it is our position that these news vendors are employees within the common law definition, if there is a common law test as such, as well as employees within the meaning of the term as Congress intended that term to be construed.

Now, in listening to the evidence, we think it would be well for the Court to note the salient features of the contract, to note generally what is covered, because already I think there has been one misstatement of that provision of that contract. There are ten salient features to that contract. Ten features and provisions, which I shall not elaborate on, but simply point out to the Court, which indicate, which we believe establish as a matter of law, from the construction of the contract, the relationship created is that of employer and employee. At the outset we ask the Court to note that the parties to the agreement are, on the one hand, the publishers and the publishers association, and on the other hand a labor union, a news vendors union of

the American Federation of Labor, which Mr. Fink referred to as an organization.

Secondly, it is evident from the very wording of the agreement, that the object of the agreement, the object of the contract, is not to provide for the sale of newspapers to [11] the vendors, but is to provide for the sale by vendors of these newspapers to the public. The ultimate objective of the agreement is to provide for the sale by the vendors, not to vendors, of the plaintiffs' newspapers.

Thirdly, we ask the Court to note that the so-called wholesale and so-called retail price of the newspapers is established by the contract.

Fourthly, we ask the Court to note and observe that not only has the publisher the right to hire whomever he pleases, it necessarily follows they must have the right in addition to that right, more significant, the right to terminate the agreement with any vendor at any time. It is euphemistically stated as the right to discontinue the sale to any vendor, but we submit it is nothing more nor less than the right to hire or fire.

Fifthly, we ask the Court to note that the publishers reserve the right implicitly to designate where the papers are to be sold.

Sixthly, the contract gives the publishers the right to designate the days and hours of any one day in which newspapers are to be sold.

Seventhly, the contract provides that these vendors shall sell complete newspapers only, with sections thereof in such order as the publishers designate.

And, eighthly, and here I must correct I believe a [12] mistaken impression of Counsel for the union: there is an express provision in the contract that when the vendor is engaged to sell a particular newspaper, he may sell only additional newspapers if the publishers permit. In other words, he may sell one or more newspapers only as the publishers permit.

Now, we ask the Court to note that the news vendor is granted full credit for unsold or returned newspapers.

And the last and perhaps the most damaging provision of the agreement is the provision for a guaranteed minimum earning, which is designated in the contract as "minimum profit." So much for the contract.

Now, Mr. Fink also has referred to the power of the vendors to control the means and methods by which they sell the papers. Whether they have that power under that contract is a matter of law, and whether they exercised it or not is immaterial, and in the absence of any express provision to the contrary in the contract, we submit they have not that power. Let it be assumed that the vendor who is selling papers on a corner designated by the publishers, at a time designated by the publishers, at a place designated by the publishers, has a free choice, unlimited discretion as to the means and methods he sells the papers on the corner. We submit he nonetheless is an employee because he has such discretion. That point could be elaborated, but we submit it is almost a subject for [13] judicial

notice that the sales technique of the vendors on the corner is so unlimited, while he is engaged in unskilled employment, so his choice on the corner as to how he sells the papers might as well be entrusted to him and still, as we believe, he is an employee.

Now, with respect to paragraph one of the agreement on which the plaintiffs rely so heavily, Paragraph I states it is the intent of the parties to establish the relationship of buyer and seller and not that of employer and employee. Of course, the Court may well ask itself why such a provision was inserted, gratuitously inserted, unless perhaps furnishing an interpretation of the agreement, and apparently contradicted by the terms of the agreement itself. In any event, it is our position that such statement is not only not binding on the Court, but it is doubtful whether it is even evident to the Court. The contract recites that the relationship is that of seller and buyer, not employer and employee, as though they were legal opposites. I think the authorities we will submit will fully show that a person may be both a buyer and an employee of the person from whom he purchases the product.

Now, lastly, it is doubtful, in our minds certainly, whether under the terms of the agreement, and it will be clarified by the evidence, whether the vendor is actually the purchaser of the papers, because we will show under the evidence, that the vendor gets the papers only on a credit basis. [14] He pays no cash on them, his possession is limited to the corner to sell under the terms and conditions

of the contract. At the end of the working day he returns the unsold papers to the publisher and then gets credit for the unsold papers. I submit it is very doubtful whether under those conditions he may be contended to be the buyer. There can be no doubt if the first purpose of the legislation is considered. The Court in hearing the evidence and being guided in the Court's decision, should give this one single factor the most significance and most weight in determining whether they are covered by the Act. I think the ultimate inquiry here is not control to be exercised, how the vendor sells the papers, whether with his right hand or his left hand, but the question is: Does he pursue an independent calling; is he engaged in a distinct occupation. We think, after hearing the evidence and an examination of the authorities, there can be no doubt, under the terms of the contract alone, that as a matter of law the vendors are employees, and the evidence submitted will only serve to confirm it.

The Court: Mr. Jacobs, some point was made by Mr. Fink in his opening statement that there might be a contention that the parties to this contract did not intend to make a contract, an independent contract. Is there going to be a contention on the part of the Government that these contracts were entered into to give the appearance of an independent contract? I mean, [15] are you questioning, are you arguing the good faith of the contract, or relying entirely upon the interpretation of the contracts themselves?

Mr. Jacobs: Our position, with respect to your Honor's question, is this: As we say, the intention of the parties is in the provisions of the contract, the very nature of the obligations and rights of the parties as stated in the contract, not what it states the relationship to be.

Secondly, we state that if the belief of the parties is evidence of relationship, it must be a bona fide belief of the factual considerations, and not by reason of any selfish, personal, or legal considerations, and I think the evidence will establish, at least on the part of the union, that there was no such bona fide belief. Do I make myself clear, your Honor?

The Court: Well, I would like to ask you another question to see if I get it clearly. Is the Government going to contend that these parties had no intent to enter into an independent contractor relationship, but used this form in order to give that appearance?

Mr. Jacobs: We submit——

The Court: What I am getting at is: Is there any contention that this relationship was entered into for any purpose of evading obligations under this statute, to give the appearance to a relationship different than the actual [16] relationship; or, are you contending, on the contrary, that irrespective of what the parties had in mind, the relationship as set out in the contract is one of employment rather than independent contract?

Mr. Jacobs: That is substantially correct. May I clarify that a little further? I don't know what purpose there was on the part of the publishers.

I cannot say of my own knowledge what the purpose of the publishers was in having this thing inserted in there. But I do know, that is I feel from the evidence we have available, that this was not a bona fide belief of both parties. Even if it was an honest belief, which we doubt, of both parties, assuming it was, I submit that the relationship created by the contract is still that of employer and employee, and there are numerous cases in the courts, where the courts have disregarded such positions.

The Court: You don't contend, do you, that these contractual relationships were entered into for the definite purpose of evading the effect of these statutes?

Mr. Jacobs: Our knowledge of it is this, your Honor, this contract was not designed to evade the obligations of the Social Security Act. It was a genuine collective bargaining agreement; there is no question about that. But, we say that the insertion of this particular clause in the contract was not a bona fide belief on the part of both parties.

Mr. Fink: If the Court please, there are some formal [17] offers of exhibits that I desire to make at this time.

In case No. 25229, I offer in evidence the exhibits attached to the complaint, in the same order. Exhibit 1 is the claim for the period April 1937 to December 1937. And I ask that they be admitted in evidence, if your Honor please, because they are all admitted by the pleadings.

The Court: They may be admitted.

The Clerk: Are they to be in the case referred to, or consolidated?

The Court: I think you can give them one number. These cases are consolidated for trial, as I understand. I think you might as well introduce them as exhibits, and we will give them exhibit numbers in order.

Mr. Fink: I am, if the Court please, going to offer these generally now, and we will refer to them afterwards.

The Court: This is Plaintiff's Exhibit No. 1

(The claim was marked Plaintiff's Exhibit No. 1 in evidence.)

Mr. Fink: Exhibit No. 2 is the claim of the Federal Insurance Contributions Act for the period shown.

(The document was marked Plaintiff's Exhibit No. 2 in evidence.)

Mr. Fink: Exhibit No. 3, which is the disallowance of a large list of claims, your Honor, by the Commissioner of Internal Revenue, on this date, July 13, 1945. [18]

(The document referred to was marked Plaintiff's Exhibit No. 3 in evidence.)

Mr. Fink: Exhibit 4 is the contract between the parties to which reference has been made.

(The document referred to was marked Plaintiff's Exhibit No. 4 in evidence.)

Mr. Fink: Exhibit 5 is a claim of refund and a protest covering the period October, 1938, to December, 1938.

(The document referred to was marked Plaintiff's Exhibit No. 5 in evidence.)

Mr. Fink: Exhibit No. 6 is a similar claim and protest for a similar period.

(The document referred to was marked Plaintiff's Exhibit No. 6 in evidence.)

Mr. Fink: Exhibit No. 7 is a claim and protest for the period January 1, 1939, to March 31, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 7 in evidence.)

Mr. Fink: A claim and protest for the same period.

If your Honor please, in the Western Publications case, there were two newspapers involved, the San Francisco Call-Bulletin, and the San Francisco Examiner. The collector in assessing, levied separate assessments, so there are two exhibits covering the same period.

(The document referred to was marked Plaintiff's Exhibit 8 in evidence.) [19]

Mr. Fink: Exhibit No. 9 is a protest and claim covered by the period April 1, 1939, to June 30, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 9 in evidence.)

Mr. Fink: Exhibit No. 10 is a similar claim and protest for the other newspaper for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 10 in evidence.)

Mr. Fink: Exhibit No. 11 is a claim and protest for the period July 1 to September 30, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 11 in evidence.)

Mr. Fink: Exhibit 12 is a claim and protest for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 12 in evidence.)

Mr. Fink: Exhibit No. 13 is a claim and protest for the period October 1, 1939, to December 31, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 13 in evidence.)

Mr. Fink: Exhibit No. 14 is a similar claim and protest for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 14 in evidence.)

Mr. Fink: Exhibit No. 15 is a claim and protest for [20] the period January 1, 1940, to March 31, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 15 in evidence.)

Mr. Fink: Exhibit No. 16 is a similar claim and protest for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 16 in evidence.)

Mr. Fink: Exhibit No. 17 is a claim and protest for the period April 1 to June 30, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 17 in evidence.)

Mr. Fink: Exhibit No. 18 is a similar claim and protest for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 18 in evidence.)

Mr. Fink: Exhibit 19 is a claim and protest for the period of October 1, 1940, to December 31, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 19 in evidence.)

Mr. Fink: Exhibit No. 20 is a similar protest and claim for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 20 in evidence.)

Mr. Fink: May I state, for the purpose of the record, that completes the exhibits attached to the complaint in that [21] particular number. So, here, for the record that completes the exhibits in Case No. 25229.

For the purpose of the record only, your Honor, I recognize they are consolidated, in No. 25228, I offer the following exhibits, all of which have been

admitted by the answer. They are going to run right along?

The Court: They are going to run right along.

Mr. Fink: Exhibit No. 21 is a claim and protest for the period January 1, 1937, to December 31, 1937.

(The document referred to was marked Plaintiff's Exhibit No. 21 in evidence.)

Mr. Fink: Exhibit No. 22 is the rejection letter from the Commissioner of Internal Revenue dated July 13, 1945.

(The document referred to was marked Plaintiff's Exhibit No. 22 in evidence.)

Mr. Fink: I will not introduce another copy of the contract, although it is attached, your Honor.

Next in order, if your Honor please, is a claim and protest for the period January 1, 1938, to December 31, 1938.

(The document referred to was marked Plaintiff's Exhibit No. 23 in evidence.)

Mr. Fink: Finally, next in order a claim and protest for a period that is not made plain here, but a claim and protest in the total sum of \$2,187.76.

(The document referred to was marked Plaintiff's [22] Exhibit No. 24 in evidence.)

Mr. Fink: That completes all of the exhibits in No. 25228.

For the purpose of the record, in No. 25231, I offer the following exhibits in evidence:

A claim and protest for the period April 1, 1937, to December 31, 1937.

(The document referred to was marked Plaintiff's Exhibit No. 25 in evidence.)

Mr. Fink: Next in order, the rejection letter from the Commissioner of Internal Revenue, dated July 13, 1945.

(The document referred to was marked Plaintiff's Exhibit No. 26 in evidence.)

Mr. Fink: I will not offer the contract. A claim and protest for the period October 1, 1938, to December 31, 1938.

(The document referred to was marked Plaintiff's Exhibit No. 27 in evidence.)

Mr. Fink: A claim and protest for the period January 1, 1939, to March 31, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 28 in evidence.)

Mr. Fink: A claim and protest for the period April 1, 1939, to June 30, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 29 in evidence.) [23]

Mr. Fink: A claim and protest for the period July 1, 1939, to September 30, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 30 in evidence.)

Mr. Fink: A claim and protest for the period October 1, 1939, to December 31, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 31 in evidence.)

Mr. Fink: A claim and protest for the period January 1, 1940, to March 31, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 32 in evidence.)

Mr. Fink: A claim and protest for the period April 1, 1940, to June 30, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 33 in evidence.)

Mr. Fink: A claim and protest for the period October 1, 1940, to December 31, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 34 in evidence.)

Mr. Fink: And that completes the offer in that individual case.

Finally, if your Honor please, in Case No. 25230, I offer in evidence the following:

A form of protest bearing date February 18, 1942, signed [24] by The Chronicle Publishing Company, by W. D. Burlingame.

(The document referred to was marked Plaintiff's Exhibit No. 35 in evidence.)

Mr. Fink: The rejection letter from the Commissioner of Internal Revenue, dated July 13, 1945.

(The document referred to was marked Plaintiff's Exhibit No. 36 in evidence.)

Mr. Fink: A claim and protest for the period January 1, 1937, to December 31, 1937.

(The document referred to was marked Plaintiff's Exhibit No. 37 in evidence.)

Mr. Fink: A disallowance letter from the Commissioner of Internal Revenue, dated July 13, 1945, referring to another one of the exhibits.

(The document referred to was marked Plaintiff's Exhibit No. 38 in evidence.)

Mr. Fink: And finally, a claim and protest in the total sum of \$668.06.

(The document referred to was marked Plaintiff's Exhibit No. 39 in evidence.)

Mr. Fink: That, if your Honor please, completes the offer of the exhibits.

Mr. Jacobs: With the permission of the Court, I would like to submit a brief in support of the Government's motion at this time. [25]

The Court: What motion are you referring to?

Mr. Jacobs: The motion for a judgment on the pleadings, which has been taken under advisement by the Court.

The Court: Oh, well, you can submit it at the conclusion of the trial. As long as I am going to hear the evidence, I would rather devote myself to that than to reading a brief during the course of the trial.

Mr. Jacobs: Very well.

Mr. Fink: If it please the Court, I will call Mr. Bitler.

The Court: Is he going to be a long witness?

Mr. Fink: It will be a lengthy witness.

The Court: Would you rather take a recess?

Mr. Fink: I don't care.

The Court: I think we had better use the five minutes.

Mr. Fink: Certainly.

EUGENE F. BITLER

called as a witness by Plaintiff; sworn.

The Clerk: State your name to the Court, please.

A. Eugene F. Bitler.

Direct Examination

By Mr. Fink:

Q. What is your occupation?

A. Manager of the San Francisco Publishers Association.

Q. And how long have you been in that position?

A. Eleven years.

Q. In San Francisco? A. Yes, sir. [26]

Q. Mr. Bitler, what is your familiarity with the newspaper business? Will you state your familiarity with the business, please.

A. Well, since 1914, outside of two years in the first war, all my life has been spent in the business.

Q. And when you say you have spent your life in the newspaper business, in what several departments of the newspaper business have you been?

A. Starting in the circulation department, going to the business office, from the business office

(Testimony of Eugene F. Bitler.)

to the classified department, then to display, then to editorial.

Q. And have you had actual experience over the course of years in the circulation department of the various papers in San Francisco and elsewhere?

A. Yes, I have.

Q. Mr. Bitler, does your name appear as the signer of all five of the contracts between the News Vendors Union and the newspapers in San Francisco?

A. Yes, it does.

Q. Now, directing your attention, Mr. Bitler, to the year 1937, do you remember the time, the approximate date when negotiations opened as between the News Vendors Union and the Publishers Association?

A. I would say around June 8th or 9th.

Q. And it thereafter continued from time to time, did it?

A. It was fairly continuous. You mean, for that particular contract?

Q. I do.

A. They were fairly continuous up to August 1st when the agreement was entered into, signed by both parties. [27]

Q. A contract was signed and is now in evidence as an exhibit here. Is that correct?

A. I guess it is.

Q. Mr. Bitler, having in mind the date of the opening, which was around June 8th or 9th, of the negotiations, when did the question of the relationship of the parties arise?

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: Objected to on the ground that it is immaterial and irrelevant. When the question arose; the intent of the parties is contained in the agreement and the negotiations, the steps or negotiations are entirely immaterial.

The Court: At first blush that would appear to be a valid objection.

Mr. Fink: It is a preliminary question only, and was intended to lay a foundation for subsequent questioning. I take it, whether the negotiations were merged into a written contract or not, we have a right to show the intent of both parties. We have a right to show the intent of the parties and to show when that intent arose. As I say, it is a preliminary question only, laying the foundation.

The Court: What would be the materiality of when the intent arose?

Mr. Fink: Simply to show, if your Honor please, that from the opening of negotiations in June, 1937, down to date, there has been a single intent of the parties to this contract. That is the issue here, what was the intent of the parties.

The Court: Well, of course, wouldn't it be self-serving [28] for any witness to testify? That is a matter the Court has to determine.

Mr. Fink: Just a minute. The question, your Honor, I think you must have misunderstood the question. The question was "When did it first arise?" I apprehend the witness will say immediately.

(Testimony of Eugene F. Bitler.)

The Court: I don't see how that will be any help to me, Mr. Fink. I think anybody who negotiates a contract has some intent in making the contract.

Mr. Fink: That is true.

The Court: They have got some purpose in mind. It is not when they had the purpose in mind; it is what they did that counts, isn't it? I think perhaps you might offer the contract, show what the parties did under the contract, submit that. If there is any question as to the meaning of the contract itself, the actions of the parties under the contract would be evidence. But, what intent you say they had, when the intent arose, really I don't see the materiality.

Mr. Ladar: I would just like to offer a suggestion in connection with the objection made here. I apprehend that while it is settled law that parties to a contract in dispute between them cannot offer evidence as to intent or any variance, nevertheless, I don't think it is the law, I think it would be easy to supply your Honor authorities on the proposition, that an objection such as the one made now—I am not talking about [29] the particular question, but the broad issue, whether the intent of the parties is evidence, it is a well known exception that when a third party is in the case, the intention is not only relevant and admissible, but may become important in the face of an objection from a third party. The rule excluding the evidence is limited to the parties to the contract.

(Testimony of Eugene F. Bitler.)

The Court: I think during the noon recess I had better read this contract and after I have done that, I can more intelligently rule on the question. We will recess until 2:00 p.m.

(Adjourned to 2:00 o'clock p.m. this date.)

Afternoon Session, 2:00 P.M.

EUGENE F. BITLER

resumed the witness stand for further direct examination:

Mr. Fink: If your Honor please, may I address myself for a moment to the objection which was made just before the noon adjournment. If the Court will refer to Paragraph 12 and Paragraph 15—the numbers vary slightly in the complaints, but it is in 25229—you will find that Paragraph 12 of that complaint reads:

“During all of the period of the negotiations of the said contract, Exhibit 4, and at the time of the execution thereof, it was the intent and purpose of the organization of News Vendors and of Plaintiff to create and maintain as between the News Vendors and Plaintiff the relationship of buyer and seller and to establish and maintain the News Vendors and independent contractors.”

Paragraph 15 of the same complaint reads:

“During all of the period of negotiation of each of the said four contracts subsequent to

(Testimony of Eugene F. Bitler.)

Exhibit 4, and at the time of the execution of each thereof, it was the intent and purpose of the organization of News Vendors and of Plaintiff to maintain the relationship of buyer and seller and to maintain the [31] status of the said News Vendors as independent contractors. Said parties during the term of each of said contracts have acted with the intent and in the belief that said contracts would be interpreted and construed as intended by said parties."

Both of those paragraphs are denied in the answers, thus making a direct issue as to the intent and purpose of the parties in their negotiations and in the consummation of the contracts.

And over and above that, and stronger in its import as far as this objection is concerned, is the fact that Counsel for the Defendant has directly, in his opening statement, by which he is bound, said, not in so many words, but by necessary inference, that these are fraudulent contracts. It was in answer to the question asked that he made that statement. He, in effect, has said that these are not good faith contracts, and therefore he is directly putting in issue the intent, the purpose and all the surrounding circumstances of these contracts.

The Court: Well, I didn't get that from his statement, that it was a fraudulent contract.

Mr. Fink: Well, your Honor, we will have to go to the record on that, because that is my recollection of what he said, by necessary inference; that you can't get anything else out of what he said.

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: Would the Court like to have me restate [32] my position?

Mr. Fink: Let us go to the record for this, your Honor.

The Court: Let's not waste time in going back over that. That is the allegation of your complaint. It is denied, but the question that is presented is, what kind of evidence is admissible under the issue raised by that allegation of the complaint and the answer? And the objection, I think, that has been raised goes more to the kind of evidence. You may have acts and conduct of the parties under the contract that would be properly admissible as evidence to prove that allegation of the complaint, but what they said during the stage of negotiations might not be admissible as evidence. In other words, merely because you have alleged that as the ultimate fact doesn't mean that every type of evidence may be offered in support of it. I would not consider myself bound by some statements that were made by both sides of this contract while they were negotiating the contract as to what they were intending to do, if, in fact, what they did do was something different. I am not saying that is the case here, but those are the difficulties that present themselves and are, in my opinion, valid objections to that kind of testimony.

Mr. Fink: Well, as I said——

The Court: I think that you have presented your contract. You can show what the parties did under it, but [33] all of the conversations that took

(Testimony of Eugene F. Bitler.)

place between them when they were negotiating the contract, I can't see how that would be material.

Mr. Fink: If your Honor please, I think I stated this morning, and it is a fact, that the question which produced the objection is merely a preliminary question going more to the time of the event, rather than to what was said or done at that time. The question was if he remembers when, in relation to June 8th or 9th, did the matter of the relationship of the parties arise. That was the question, I think not the exact words, maybe, but the same thought.

The Court: Of course that may not be subject to that same objection. It is really immaterial, though.

Mr. Fink, it seems to me that you have a question here as to whether or not you are required to pay this tax, and that depends upon what your status is in fact.

Mr. Fink: That is right.

The Court: Now, what the parties said when they were creating the status, I do not see how that would have any effect on the matter. They may have said anything imaginable. They may have said it was their intent to create a vast corporation; but it is the status of the plaintiff and of the newsboys, news vendors, that is going to determine whether or not you are subject to paying the tax. That question of status is a question of physical fact. What is it? Not what the [34] parties said they were going to do when they did it, but what are they doing

(Testimony of Eugene F. Bitler.)

and what is their relationship today? Under what instrumentality or contract or agreement or structure are they functioning, and what are they doing? And those are the facts it seems to me, on which the Court should decide whether or not the statute requires the payment of that tax.

Mr. Fink: There is no question that the——

The Court: I think that is a fair statement of what I have to decide. I can't see how anything that the parties said in negotiating these contracts could make a bit of difference one way or the other, because, as a matter of fact, I wouldn't feel that I should pay much attention to it even if it went into the record and were by some standard admissible, because I might have a long discussion with you and say, "Well, Mr. Fink, now I am going to employ you as my secretary," and you say, "All right, I want to be your secretary"; and then we sit down and we make a contract which provides instead of you being my secretary, it said you are going to sell some property of mine on a commission basis. The fact that we had those conversations couldn't possibly change the factual situation that actually subsequently obtained. I can see that I could be led into a great many pitfalls by listening to conversations that took place between the parties that couldn't possibly change what is actually the fact. Now, if it is the fact that these news vendors are independent contractors, you [35] should not have to pay this tax.

Mr. Fink: That is true.

(Testimony of Eugene F. Bitler.)

The Court: If, in fact, they are employees, then you should have to pay the tax.

Mr. Fink: That is right.

The Court: Why don't you just give me the evidence on that and present your argument on that?

Mr. Fink: Well, if your Honor please, seriously—and I am really serious—we deem this to be the crux of the case, to show the surrounding circumstances under which the first contractual relationship—that is the first written contract—came into being. I do not intend, and my question does not import it, that I am going into detailed conversations or anything of that sort. As I have tried to make plain, the question has for its purpose the eliciting of an answer, which is a fact, from the witness that this question arose almost at once, and that thereafter they proceeded upon a particular basis and concluded the contract. Now, that is as far as the evidence will go, and I think, if your Honor please, in view of the opening statement of Counsel—respectfully disagreeing with the Court—that I am entitled to make that showing.

The Court: Well, I just don't think that he used the word "fraudulent."

Mr. Fink: Well, I didn't say that he used the word "fraudulent." I said by necessary inference what he did say [36] that there could only be the one interpretation, namely, that he is alleging that it is a fraudulent contract.

(Testimony of Eugene F. Bitler.)

The Court: Well, suppose you restate the question again.

Mr. Fink: May it be read?

The Court: It will take too long; we haven't the same reporter at the time that you asked the question to which the objection is made.

Mr. Fink: All right, your Honor.

The Court: You say you are not going into any detail as to the conversations. It may be the question will be more or less harmless.

Q. (By Mr. Fink): Mr. Bitler, having in mind the probable opening date of these negotiations, June 8th or 9th, when, in relation to that date, did the matter of the relationship of the parties first arise?

Mr. Jacobs: The same objection, your Honor.

The Court: I will overrule the objection. You have my views on it and you know how much weight I am going to attach to it anyhow, so I don't see any harm in allowing it in the record.

A. At the first meeting, the question—as a matter of fact, the only thing discussed at the first meeting was the relationship between the parties. The publishers stated—

Mr. Jacobs: I am sorry; I can't hear you. Not only [37] that, but what I heard was not responsive to the question. The question is When? Is that right?

A. At the first meeting.

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: I am sorry; may be I didn't understand the question. Will you read it, please?

(The Reporter read the question.)

A. My answer is, at the first meeting, whether it was June 8th or June 9th; I don't recall which.

Q. (By Mr. Fink): Mr. Bitler, how did it arise? A. It arose from——

Mr. Jacobs: Same objection, your Honor, to this whole line of testimony.

The Court: Well, Mr. Fink, what are you going to show from this witness? Perhaps that will enable me to rule on it a little more intelligently and get over this phase of the matter. Do you want to show that the parties entered into a discussion as to whether they were going to be employees or whether they were going to be independent contractors; that they discussed it, and that as a result of that, they worked out the contract the way the contract is worked out?

Mr. Fink: If your Honor please, one step further than that. The negotiations opened on June 8th or June 9th. They were almost continuous to August 31st, 1937, a considerable period of time, about three months.

The purpose of the question is to show that while the [38] union had some ideas at the opening that they wanted to come under the employees' status, that there immediately arose a question; that as a result of that, the union retired from that position and that during the entire three months there was

(Testimony of Eugene F. Bitler.)

thereafter no question as to the basis of the negotiations. That is the sole purpose of the question, and it is not intended to elicit detailed conversatons at all.

The Court: Well, I think I can shorten that up. You heard Mr. Fink's statement; is that a correct statement of what went on, Mr. Bitler?

A. I think I should put it in my own words, if you please, your Honor. At the first meeting the publishers stated that they were willing to negotiate with the union on the basis of a buyer and seller contract. That was agreeable to the union. Attorneys were brought in, Mr. Fink and Mr. Calkins, to develop a contract which was a buyer and seller contract. Does that answer the question?

The Court: That is what you wanted to bring out?

Mr. Fink: Yes, your Honor.

The Court: All right.

Mr. Jacobs: Your Honor, I must move to strike that answer.

The Court: You may have been deemed to have made a motion to strike it, and it is denied.

Mr. Jacobs: Because it calls for a conclusion, and it is hearsay. [39]

The Court: I think it is subject to those objections. I will overrule the objection.

Q. (By Mr. Fink): Mr. Bitler, let me ask you—did I understand you to say that attorneys were imported into the discussions?

(Testimony of Eugene F. Bitler.)

A. After the first meeting, with an agreement being reached with the union and they were buyers and sellers and the contract could be developed on that basis, attorneys Grove Fink and John Calkins were asked to develop a contract on a buyer and seller basis.

Mr. Jacobs: I move to strike all of that as not responsive to the question. The question is whether attorneys were brought into the conference.

The Court: You are right about that. Your objection is good; that was the question. I think the witness had already answered it, Mr. Fink. He said, in answer to my question that attorneys were brought in.

Mr. Fink: All right.

Q. In the course of the negotiations, Mr. Bitler, were the several sections of the contract negotiated separately?

A. Yes, they were. As a matter of fact, agreement might be reached on anywhere from one to two or three sections at one meeting; at another meeting another three or four sections; another time it might have to be modified and revamped and [40] different language developed to cover an agreement that was finally reached.

Q. By the way, who represented the News Vendors Union in these negotiations?

A. At that time it was the Pacific Coast Labor Bureau; at the present time it is known as the National Labor Bureau.

(Testimony of Eugene F. Bitler.)

Q. Who was the personality that negotiated for the union?

A. Sam Kagel, with Mr. Shelley of the San Francisco Labor Council.

Q. Was there always unanimity of opinion on the several subjects or several sections covered by the contract?

Mr. Jacobs: I object as irrelevant, incompetent and immaterial, and calling for the conclusion and thought of this witness.

The Court: I will sustain the objection. I think it is incompetent.

Q. (By Mr. Fink): Mr. Bitler, I think you testified you have been in San Francisco for eleven years.

A. Yes, sir.

Q. Do you know what the position of the news vendors was in San Francisco prior to August 31, 1937?

Mr. Jacobs: Objection as to what the position was; I don't know myself what Counsel means.

Mr. Fink: Well, let us withdraw the question and see if we can get it so even you can understand it.

Mr. Jacobs: Thank you. [41]

Q. (By Mr. Fink): Mr. Bitler, are newspapers sold in the City of San Francisco to news vendors on a wholesale basis prior to August 31, 1937?

Mr. Jacobs: Same objection, whether they were sold or not.

The Court: Well, I think that is immaterial. I will sustain the objection.

(Testimony of Eugene F. Bitler.)

Mr. Ladar: If your Honor please, may I say a word on that, not with respect to the ruling, but with respect to the general subject matter? I took the trouble to check it during the noon hour, and I want to call this to your Honor's attention, that as I understand what Counsel has been attempting to do, he is attempting to show the circumstances surrounding the parties at the time that the series of contracts began. The decisions seem to be quite uniform in this rule, your Honor, that where, as happened here this morning, a statement is made in response to the Court's question, that one section of this contract at least with respect to one of the parties was not made in good faith, and furthermore the statement was made that the relationship of buyer and seller and not independent contractors, is referred to in the contract, and that there may be a meaning there other than independent contractor, the Court should—I mean, certainly the Court is legally empowered, and in the exercise of that power should take into consideration all of the circumstances that surrounded these [42] parties at the time of the execution of their contract, because the question of good faith and the question of meaning and intention is injected into the case.

The Court: Well, of course, you do not have to meet the defendant's opening statement as part of the plaintiff's case. He just made his statement to advise the Court what he was going to contend, but you don't have to start out and affirmatively prove

(Testimony of Eugene F. Bitler.)

such an issue as good faith until there has been something for you to rebut along that line. I think that is a fallacy in the reasoning of both you and Mr. Fink. You show your contract, it is up to the other side then to show that the contract doesn't truly represent the actual situation. You don't have to meet that in advance.

Mr. Ladar: That is true, except that it was formulated in the pleadings in the first instance as one of the issues if you read these pleadings.

The Court: It may have been an issue the defense raised. You don't have to meet it as part of your case until you have got something to meet. They may present that, but until they do present it you haven't anything to meet along that line as far as I can see. I don't see why you just don't get along and present the evidence as to the relationship of these parties, and if it is necessary to rebut any showing that is something that is artificial about this contract or this relationship, you can do that by way of rebuttal. But I think [43] that you are anticipating defenses, aren't you?

Mr. Ladar: The flesh and blood of the relationship comes into being and the circumstances they found themselves in on a certain date, and they pass from that to what they did. And those two things together would probably more clearly make and show the relationship, and I think Mr. Fink's last question might be important——

The Court: I don't know what you are getting at. The opening statement didn't indicate to me

(Testimony of Eugene F. Bitler.)

that the attorneys were going into any preliminary matters at all.

Mr. Ladar: The last question——

The Court: What is it you want to show by this? Tell me what it is, then maybe I can understand what you are getting at.

Mr. Fink: If your Honor please, I believe it important to show, in view of the attitude on the statement of Counsel, I believe it to be pertinent and necessary to show that this was an arms-length negotiation wherein the base subject matters which Counsel indicated as indicative of the employer-employee relationship are just contract negotiations.

The Court: May I ask you a question, then I think I can get at it more quickly. Prior to this contract there was no contract?

Mr. Fink: There was no written contract. There were contracts. [44]

The Court: There were disputes existing as to the terms and conditions of the relationship between the news vendors and the newspapers?

Mr. Fink: No, we know of no disputes. All we know is that upon some date in June, or possibly late in May, we were approached that an organization wanted to negotiate with us. That was the fact, there was no dispute. This organization which was formed in May, I believe, some time, or finally formed in May 1937, came in and said they wanted to negotiate and we said, "All right." As far as we know there was no dispute at all.

(Testimony of Eugene F. Bitler.)

The Court: Previously you had had relations with the news vendors independently of the association; is that what you mean?

Mr. Fink: That is true, your Honor.

The Court: Now, you want to show at this time this contract was negotiated it resulted from overtures to the publishers organization?

Mr. Fink: That is true. That is true. There was no dispute; it wasn't the result of any——

The Court: How will that throw any light upon the interpretation of this relationship?

Mr. Fink: If your Honor please, I don't know how it would make it plainer except to say again that it does show that these various things that the Government is saying spell [45] employer-employee were the result of negotiation which finally resulted in contracts. Apparently the position of the Government must be that these conditions were imposed by force upon the union.

The Court: That is the first time you have told me something that lets light on it. I think that may be the case.

Mr. Fink: I anticipated that.

The Court: All right, go into that.

Mr. Jacobs: May I state for the purpose of the record——

The Court: You may have an objection.

Mr. Jacobs: That is not the Government's position.

The Court: Well then, it cannot do any harm to let it go in. We will save time.

(Testimony of Eugene F. Bitler.)

Mr. Fink: Now, I don't know whether there was a question pending. If there was, I will withdraw it and start again.

Q. Mr. Bitler, did the subject of the wholesale and retail prices of newspapers arise during the period of these negotiations in 1937?

A. Yes, it did.

Mr. Jacobs: May it be understood that the Government's objection goes to the whole line of this testimony?

The Court: All right. Let the record show that.

Q. (By Mr. Fink): Will you just state generally: The parties had divergent views on the wholesale and retail prices. Is that accurate? [46]

A. Yes.

Q. And did you ultimately reach the agreement as expressed in the contract? A. We did.

Q. Mr. Bitler, during the course of these negotiations did the subject-matter of the selling hours arise? A. Yes, sir.

Q. And were there divergent views of the parties on matters of selling hours?

A. To some extent, not too far distant from each other.

Q. One party proposed a certain period of time and another party proposed a different period of time?

A. The publishers proposed a period, if I might say, in accordance with edition times, reader habits, and so forth.

(Testimony of Eugene F. Bitler.)

Q. And the union presented a plan of different scheme for selling hours?

A. Originally they presented an original plan, that is, the plan for selling, but there was not much discussion over the matter of hours. Finally, it evolved in the contract.

Q. Ultimately that resulted in a meeting of minds? A. Yes, sir.

Q. By the way, you mentioned something about edition time, Mr. Bitler. Can you briefly describe what dictates the selling hours of newspapers?

Mr. Jacobs: An objection, if it please the Court, unless you qualify this man as an expert, not only on the newspaper business, but that he is authorized to speak for the practice of each of the publishers here involved, and each newspaper here involved. If anybody is qualified to testify here it is [47] the newspaper publisher himself.

Q. (By Mr. Fink): Mr. Bitler, didn't you testify you had been in this business since you were fourteen years of age? A. Since 1914.

The Court: I will overrule the objection.

Q. (By Mr. Fink): Be brief about it, Mr. Bitler; what determines the selling hours of newspapers?

A. The release of news and the reading habits of the public in different localities. In other words, in San Francisco you want evening papers to hit the streets earlier than probably in Portland or Seattle, or some other city. It is all a matter of

(Testimony of Eugene F. Bitler.)

the release of news and reading habits of the public in the locality.

Q. Does wire receipt of news by newspapers have anything to do with the selling hours?

A. Yes.

Q. Does the concentration of the public at given points at given times have anything to do with the determination of selling hours?

A. Yes, it does.

Q. And from those elements, the edition time is fixed. Is that right? A. Yes.

Q. Now, Mr. Bitler, do you recall a discussion on the subject of sales outlets on the corners?

A. Yes, sir.

Q. And did that occupy a considerable part of the time of the negotiating committee?

A. It did.

Q. Were there divergent views on the subject of sales outlets? [48]

A. There were, due to the fact that the union desired to protect its members insofar as their profits were concerned. In other words, at some outlets there was a question as to how near a news vendor at another outlet could be, the ratio of newsboys to news vendors in certain zones throughout the city, and other matters which were duly negotiated and set forth in the contract, as I say, to protect the profits of the news men.

Q. Do you recall a discussion on the subject matter of the guarantee of profit?

A. Yes, sir.

(Testimony of Eugene F. Bitler.)

Q. Was that another subject that occupied a considerable period of time over those three months? A. Yes, I would say it did.

Q. And——

A. May I qualify that and say that the guarantee seemingly was not so important as questions surrounding the news vendors selling either full time or part time corners. In other words, seemingly they were more interested in getting a condition in the contract that would protect their profit or sales on the various corners.

Q. And that was designed, then, the corners were designed, together with the guarantee, to give a profit sufficient to justify a news vendor selling at that outlet?

A. That was it. I might qualify that further to say that Mr. Shelley, at his instance a full map of the City was developed and several meetings were held with that map and certain pins used in the map to indicate outlets and setting up the City in zones, setting up the number of newsboys, that is, newsboys [49] under the age of sixteen, the number of newsboys, the ratio of newsboys to news vendors in those various zones.

Q. Mr. Bitler, do the newspaper publishers in San Francisco maintain vendors at various times upon corners which in themselves will be unprofitable?

A. Yes, they do. They do that, if I may go further, they do that because in certain districts one newspaper does not sell and because probably they

(Testimony of Eugene F. Bitler.)

have not had proper representation in that district, or that particular part of the City, and they will put in what they call "dirt" corners to start the sale of newspapers in that particular district.

Q. That relates, does it not, to the matter of circulation? A. Yes.

Q. Those news vendors that are put on these so-called "dirt" corners would not make sufficient profit by the sale alone of newspapers to justify their staying at the outlet?

A. They would not in the beginning, that is, in such a corner supposedly, they would not make the guarantee.

Q. Then the guarantee was a device to secure representation?

A. That and to guarantee the news vendor a certain profit.

Q. Mr. Bitler, from your wide experience in the newspaper business do you know of any contract other than the one in San Francisco that is similar to it? A. The only one——

Mr. Jacobs: I object, if it please the Court. If we are going to have evidence about other contracts, let's have them [50] produced in evidence here.

The Court: What is your purpose?

Mr. Fink: I asked if he knew.

The Court: Do you want to pursue this further?

Mr. Fink: I don't care about it.

The Court: It would not make a difference, would it, if there were other contracts?

(Testimony of Eugene F. Bitler.)

Mr. Fink: Well, it goes to one of the matters that will arise in argument, your Honor. The only purpose of the question is to show that insofar as we know, at this time there are two contracts in the entire United States which are similar to this, two contracts of this character in the entire United States. One is in Oakland and one in San Francisco. Those are the only places we know of. In the argument it will develop, and we will make a point of that, that we are assessed in San Francisco and they are not assessed in Oakland, a matter of discrimination.

The Court: I have enough to do to pass on the merits of this case without passing on the diligence of the taxing authorities.

Mr. Fink: I think, when it comes to a question of discrimination, it is directly in your lap, your Honor.

Mr. Linn: Maybe you will insure an assessment in Oakland now.

Mr. Fink: The question was just to develop that.

The Court: Well, you have stated it. If you say that is a fact, maybe Counsel won't dispute it, for what it is worth it is in the record.

Mr. Jacobs: Similar contracts?

The Court: Yes.

Mr. Jacobs: I certainly do object to it.

The Court: I will sustain the objection. Counsel stated what he was getting at, and it did not seem particularly material.

(Testimony of Eugene F. Bitler.)

Q. (By Mr. Fink): Mr. Bitler, is there a contract which is very much like this San Francisco contract, in the City of Oakland?

Mr. Jacobs: The same objection.

The Court: I think the objection is good. I will sustain it.

Q. (By Mr. Fink): Now, Mr. Bitler, leaving the 1937 contract for the moment, was a new contract negotiated in 1939?

A. Yes. Negotiations were started on that about around September 1938, as I recall.

Q. And was the subject-matter of the relationship of the parties again a matter under discussion?

A. It was.

Q. At the outset of the negotiations?

A. It was.

Q. Was there a meeting of the minds in the difference of opinion finally?

A. There was.

Q. And did the parties agree in the 1939 contract on language [52] similar to the 1937 contract?

A. It was not similar; it was identical.

Q. That was Section 1 of the contract?

A. That is right.

Mr. Fink: And now, for the purpose of the record, I will, your Honor, read at this time Section 1 of the contract which is identical throughout the five:

“Section 1. Each of the parties hereto agrees that the intent of this agreement is to maintain the relationship of seller and buyer,

(Testimony of Eugene F. Bitler.)

and not the relationship of employer and employee, and neither party hereto will construe anything herein, and nothing herein shall be construed otherwise than in accordance with this expression of the intent hereof."

Q. Now, Mr. Bitler, was another contract negotiated in the year 1940? A. Yes.

Q. Did the subject-matter of the relationship of the parties arise at that negotiation?

A. No, sir.

Q. And is it the fact, Mr. Bitler, that the contract of 1940 contains an identical paragraph with the one I just read?

A. Yes, sir, and that was the original union's proposal.

Q. They, themselves, proposed it?

A. Yes.

Mr. Jacobs: May it please the Court, may we have the contracts in evidence instead of this witness testifying?

Mr. Fink: I will be delighted. I was laying a foundation to introduce them. [53]

The Court: Have you seen copies of the contracts?

Mr. Fink: They have copies.

The Court: Is there any objection?

Mr. Jacobs: No, your Honor.

Mr. Fink: I now offer in evidence and ask that it be marked, a copy of the 1939 contract.

(The document referred to was marked Plaintiff's Exhibit No. 40 in evidence.)

(Testimony of Eugene F. Bitler.)

Mr. Fink: A copy of the 1940 contract.

(The document referred to was marked Plaintiff's Exhibit No. 41 in evidence.)

Mr. Fink: A copy of the 1942 contract.

(The document referred to was marked Plaintiff's Exhibit No. 42 in evidence.)

Mr. Fink: And a copy of the 1944 contract.

(The document referred to was marked Plaintiff's Exhibit No. 43 in evidence.)

Mr. Fink: I will say to the Court I am not delivering a copy to Counsel *because already* have got them. They were delivered to them in Washington.

Q. To shorten the examination, Mr. Bitler, is it true that each one of the contracts now introduced in evidence all contain that section 1?

A. Yes.

Q. In the same language? A. Yes, sir.

Q. And it is true also, Mr. Bitler, that beginning with the [54] year 1940, again in 1942, again in 1944, the subject-matter did not even arise?

A. It did not. May I say that each of those agreements were two-year agreements. The first two agreements were one-year agreements.

Mr. Bitler, in the 1939 contract the union submitted an initial proposal, did I understand you to testify? A. Yes, sir.

(Testimony of Eugene F. Bitler.)

Q. And that would have been submitted in 1938, some time in October?

A. No, I would say it was submitted some time prior to August 31, 1939, but what date I am not sure.

Q. I hand you a mimeographed document. Is that the original union proposal for the 1939 contract?

A. Without checking it I would say it looks like it, yes.

Q. I would like you to be sure, if you will. There is a date in the upper right-hand corner in lead pencil. Is that your handwriting?

A. That is my secretary's handwriting. That is right, it is the original proposal of 1938.

Q. This was mimeographed by you in your office?

A. I am not sure, Mr. Fink, whether we mimeographed it or the union mimeographed it and sent us copies.

Mr. Fink: I have just the one copy of this, Judge. I do not have an extra copy.

The Witness: You see, many of these proposals, your Honor, were developed by the Pacific Coast Labor Bureau and they were in position to mimeograph them at times. At other times they [55] were not, all according to the amount of people they had to work on them.

Mr. Fink: If your Honor please, I offer in evidence and ask that it be appropriately marked, the

(Testimony of Eugene F. Bitler.)

Union's proposal which Mr. Bitler has identified, as being the opening of the 1939 negotiations.

The Court: Any objection?

Mr. Jacobs: No objection.

(The document referred to was marked Plaintiff's Exhibit No. 44 in evidence.)

Q. (By Mr. Fink): Now, Mr. Bitler, I hand you a letter on the letterhead of the News Vendors Union of San Francisco, signed by Charles H. Bowers, dated October 6, 1938. Is that a part of the negotiation of the 1939 contract?

A. Yes, sir.

Q. And that was received by you in the ordinary course of mail?

A. Yes, sir. This is the result of I don't know how many meetings. It is the original Union proposal submitted in 1935. This letter dated October 6, 1938, developed by the News Vendors Union contains various sections the Union themselves modified from their original proposal.

Q. Mr. Bitler, referring back to the other document which was the opening proposal for the 1939 contract, I called your attention to a date in lead pencil in the upper right-hand corner, which was July 6, 1938. Does that refresh your [56] recollection as to the opening of the negotiations?

A. There was 60 days notice, any time 60 days prior to the termination of the contract they could open.

(Testimony of Eugene F. Bitler.)

Q. That was the approximate date, anyway, of the opening?

A. Yes. Now, the opening also gave the publishers the privilege of submitting counter-proposals within 35 days, so the original meetings may not begin until 40 or 50 days after the original News Vendors' proposals were submitted.

Mr. Fink: I will now offer in evidence, if it please the Court, the letter of October 6, 1938, to which there is appended a draft of an agreement, and ask that it be appropriately marked.

Mr. Jacobs: I will state that I have no objection to this document as such, reserving my initial objection made to the whole line of testimony.

The Court: Very well. It may be admitted.

(The documents referred to were marked Plaintiff's Exhibit No. 45 in evidence.)

Mr. Fink: Mr. Clerk, may I have Exhibits 44 and 45, please.

May it please the Court, I desire to direct your attention to the fact that the opening draft of the agreement, now Exhibit No. 44, contained as Section 1 the following:

"Section 1. (a) The Publishers recognize the Union as the sole collective bargaining agency for all News Vendors coming under the terms of this agreement. [57]

"(b) This agreement shall apply to the sale of newspapers of the Publishers by News Vendors coming under the terms of this agree-

(Testimony of Eugene F. Bitler.)

ment in the city and county of San Francisco, at the site of the Golden Gate International Exposition, in Daly City, and at special events in San Mateo County.

“(c) A News Vendor is hereby defined to be a person eighteen (18) years of age or over who offers for sale newspapers of the Publishers at retail at or on any point of sale within the area defined in Section 1, paragraph (b).”

And in the letter of October 6, 1938, addressed to San Francisco Newspaper Publishers' Association, it reads:

“Gentlemen: Enclosed you will find copy of Union's revised proposal for your consideration.

“We are ready to resume negotiations with your committee and suggest that we meet Tuesday and Thursday, October 11 and 13, at 10:30 a.m. to 12:30 p.m., and 2:15 p.m. to 4:30 p.m.

“Very truly yours,

“NEWS VENDORS UNION

No. 20769

By CHARLES H. BOWERS,

Secretary-Treasurer.”

I desire to state, without reading it further, that section 1 of the revised proposal, Exhibit No. 45, is identical with [58] those appearing in the other five contracts which already have been introduced, and state the intent of the parties is buyer and seller, independent contractors.

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: That is not a true statement of the contents of that paragraph. It speaks for itself in its printed form.

Q. (By Mr. Fink): Mr. Bitler, can you briefly encompass in a few words what the major changes were in the four contracts after the 1937 contract? I don't want you to go into it in detail, unless Counsel does.

A. Very few changes. One had to do with rezoning in the matter of the ratio of newsboys to news vendors. The matter of guarantees. At one time we had a new agreement. We had to have something in there to cover Treasure Island during the World Fair. But, the majority of changes have had to do with the guarantee. In other words, to the full-time corner and the part-time corner. As a matter of fact, since 1940 I don't believe there has been any discussion on any issue of importance except the guarantees.

Q. May I suggest to you, Mr. Bitler, that you discussed a change in hours after the 1937, the hours of selling?

A. The 1937 contract?

Q. Was there a change?

A. To my recollection the only change made was on the side of the morning newspapers.

Q. That was at the suggestion of the Union?

A. Yes, sir. What I mean is, the morning papers had no sale [59] hours, what were called A.M. Outside Sale Hours.

Q. I think that would be helpful to the Court. I know it was a mystery to me at one time, if you

(Testimony of Eugene F. Bitler.)

will state what the A.M. side and the P.M. side mean. Explain that.

A. I think possibly someone representing the morning newspapers could explain that more fully.

Mr. Fink: All right. Take the witness.

Cross-Examination

Mr. Jacobs: May I see Exhibit No. 44, Mr. Clerk? Before proceeding with the examination of the witness, since this exhibit was read from by opposing Counsel, I should like to read another part of the same exhibit, No. 44, Section 2:

“The Publishers agree that for the sale of newspapers in the areas defined in Section 1, paragraph (b), they will employ and retain in employ only members of the Union in good standing.”

Mr. Fink: Thank you. I had intended to read that and I overlooked it.

Q. (By Mr. Jacobs): Mr. Bitler, you have been for how many years manager of the San Francisco Publishers Association? A. Eleven years.

Q. Have you had any other *employ* in that time?

A. No. Well, I would say this, there is the Oakland Newspaper Publishers Association which I also had under my jurisdiction.

Q. Have you ever worked for The Examiner, The Chronicle, or [60] The Call-Bulletin?

A. Not in any capacity other than as manager for Association.

(Testimony of Eugene F. Bitler.)

Q. Who supports the San Francisco Publishers Association?

A. The four San Francisco newspapers.

Q. Is it a non-profit organization?

A. That is right.

Q. That is your full-time duty?

A. That is right.

Q. Now, do you remember when the News Vendors Union was first organized in 1937?

A. Yes, I do.

Q. Approximately when was it organized?

A. Oh, I would say the early part of May.

Q. You remember when they first requested negotiations for a contract with the Publishers?

A. That latter part of May.

Q. Do you recall that they threatened to strike unless they got a contract with the Publishers?

A. Well, no, I don't right now. They may have. I will have to qualify that, because the Union in many instances threatened to strike, but I do not recall that the News Vendors issued such a statement. They may have, but I am not sure.

Q. Do you remember when they made their first demand for a union contract?

A. I would say the early part of June, or the latter part of May, 1937.

Q. If you recall, at first the publishers refused to negotiate with the union. Is that correct?

A. Not after they received their charter from the A. F. of L. and secured the backing of the San Francisco Labor Council. [61]

(Testimony of Eugene F. Bitler.)

Q. Prior to that time they had refused, had they not?

A. They only refused because the News Vendors had not been able to get a charter, had not been recognized by the A. F. of L., the C. I. O., or the San Francisco Labor Council.

Q. At no time did the publishers refuse to negotiate because the vendors were not employees?

A. I beg pardon?

Q. Do you remember any time the publishers refused to negotiate with the News Vendors Union for the reason that they were not employees?

A. I would say in the first meeting we stated they were not employees. We were willing to negotiate on the basis of buyer and seller relationship, but not employer and employee relationship. We never considered them employees, and they were not employees.

Mr. Jacobs: I move to strike all the answer as not responsive to the question, and I will repeat the question again.

Mr. Fink: Let's have a ruling on the objection. I submit that it was directly responsive.

Mr. Jacobs: No. I asked if at any time——

The Court: I think the answer may go out. The question was whether they refused to negotiate.

Mr. Jacobs: That is right.

A. If I recall, there was no offer on the part of the union to negotiate because they did not have a charter. After they received the charter and submitted the proposal, we were [62] perfectly willing to sit down and discuss it with them.

(Testimony of Eugene F. Bitler.)

Q. Could there have been a threat to strike and you would not know about it, or you may not remember it?

A. I may not recall it, but if there was a threat to strike, certainly it would come to my attention.

Q. But you may not remember it?

A. I may not.

Q. Now, have you in your files, as manager of the San Francisco Publishers Association, the first written proposal submitted by the News Vendors Union for a contract with the publishers?

A. I do have, but I turned it over to Mr. Fink.

Q. You received a subpoena to produce it?

A. Yes.

Mr. Jacobs: Will you produce it, please.

Mr. Fink: It is already in evidence; it is Exhibit 44.

Mr. Jacobs: I beg your pardon. Maybe Mr. Fink did not understand the question.

A. Exhibit No. 44 is the 1938.

Mr. Jacobs: I referred to the original proposal of 1937.

Mr. Fink: Oh, I thought you were referring to the 1939. I am very happy to accommodate you, Counsel.

Mr. Jacobs: Will you mark this for identification, please.

(The document referred to was marked Defendant's Exhibit A for identification.)

(Testimony of Eugene F. Bitler.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit A for identification and ask you if you recognize it?

A. I do, as the original proposal of the News Vendors Union, [63] submitted some time the latter part of May. The identification on here is June 14, 1937, so I guess that is what the date was.

Q. Is Defendant's Exhibit A for identification the first written proposal you received from the union?

A. As far as my recollection serves me, yes.

Mr. Jacobs: At this time I would like to read from Defendant's Exhibit A for identification.

Mr. Fink: Well, let's get it in evidence.

The Court: Yes. Do you wish it in evidence?

Mr. Jacobs: I thought it might be improper to introduce it at this time. I will be happy to.

Mr. Fink: I will be happy to have it in.

Mr. Jacobs: I thought I had to wait for the defendant's case.

The Court: On cross-examination you can introduce it if you wish.

Mr. Jacobs: The Government offers Defendant's Exhibit A for identification, in evidence.

The Court: Any objection?

Mr. Fink: No objection.

The Court: Very well. let it be admitted.

(Defendant's Exhibit A for identification was marked Defendants' Exhibit A in evidence.)

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: (Reading): "Section A. It is agreed by and [64] between the Publishers and the Union that the conditions of employment contained herein will be enforced, recognized and lived up to by the employees of the Publishers who engage news vendors or hustlers selling the papers of the Publishers covered herein."

Reading from Paragraph (1): "Only members of the News Vender's Union in good standing shall be employed from the office of the Union, for the retail sale of newspapers upon the streets and within the limits of the city of San Francisco."

Q. Now, do you recall whether there was any meeting between the publishers, or the Publishers Association or their representatives and the representatives of the Union prior to the first written proposal submitted by the Union, Defendant's Exhibit A?

A. I do not recall such a meeting, no.

Q. The first meeting occurred after the proposal, did it not? A. Yes.

Q. Who were present at that meeting?

A. Representing the Union?

Q. Representing first the San Francisco Publishers Association.

A. Representing the San Francisco Publishers Association was myself; Mr. Gilroy representing the Chronicle; Mr. Ely representing the Call-Bulletin; Mr. Mayer representing the Examiner, and Mr. Paul Stoore representing the News.

(Testimony of Eugene F. Bitler.)

Q. Any representative from the Union there?

A. Yes, Mr. Kagel, as I recall, represented the Union as counsel. If my recollection serves me correctly, I think Mr. Bowers was there. I am not sure so far as the Union committee is concerned.

Q. There were certain members of the Union there at the time. Is that correct?

A. Yes, I would say at least five or six.

Q. You will note in Defendant's Exhibit A, if you may recall it, that the News Vendors refer to themselves in that proposal as employees.

A. Yes, sir, their whole contract, their whole proposal was based on an employer and employee relationship.

Q. Were any attorneys present at that first meeting?

A. Attorneys? No, sir, not as I recall it.

Q. Is it not true that the representatives of the publishers and the Publishers Association told the Union representatives they would not negotiate for a Union contract unless a clause was put in the contract stating they were not employees?

A. It was not put exactly that way. If I may change your question, it was put on the basis that the News Vendors had not been employees, were not employees, we did not consider them employees, we would not negotiate with them on the basis of employer and employee relationship.

Q. Did you not tell them there would have to be a statement to that effect in the contract before the contract would be [66] negotiated?

A. I assume we did.

(Testimony of Eugene F. Bitler.)

Q. At that meeting is it not true that the Union representatives took no action on that proposal?

A. I am not sure whether they took a recess as the result of that meeting and agreed at that meeting or came back a day or two later. I am not sure. It may have been that they had to submit it to their membership. I am not positive.

Q. And is it not true that the Union representatives finally told you they would accept such a proposal as a condition to the negotiations?

Mr. Fink: Wait just a minute. Will you repeat that question?

(Question read by the Reporter.)

A. They did.

Q. (By Mr. Jacobs): Is it not true they told you further that what they were primarily interested in was obtaining a Union contract and establishing working conditions and a fair return for their services?

A. One, they wanted union recognition; two, they wanted collective bargaining; three, as a result of that bargaining they wanted a written contract. We were agreeable to negotiate for the signing of a written agreement with them.

Q. And the representatives told you, did they not, that it was immaterial to them how they were designated in the contract?

Mr. Fink: Now, just a minute. If your Honor please, [67] I have not heretofore objected, but it is now apparent that Counsel is asking, and is going

(Testimony of Eugene F. Bitler.)

to continue to ask for conversations, and if he is going to ask for them, I submit there is a proper way. I object on the ground that no foundation has been laid.

Mr. Jacobs: Now, if it please the Court, on direct examination this witness testified to the purport of conversations throughout the entire negotiations.

The Court: I don't think he went into any conversations. He said they talked about certain of the subjects of the contracts, but he did not say what they said. I think I am correct in that.

Mr. Fink: That is correct. I asked for the subject-matter.

The Court: I think that all Mr. Fink was attempting to do, what he covered in the direct, was that these matters set forth in the contract were a subject of discussion. I think that is as far as he went, I think, in deference to your objection and the Court's ruling.

Mr. Jacobs: I will reframe the question:

Q. Do you recall what the Union representatives said to the representatives of the Publishers at that time was that they would accept such a statement in the Union contract as a condition of negotiations?

A. They informed us they were willing to accept the relationship of buyer and seller. [68]

Q. As a condition of negotiation?

Mr. Fink: Just a minute. I submit the question has been asked and answered, and this is not an answer.

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: He answered the question before.

The Court: I think it has been covered.

Mr. Jacobs: Yes.

The Court: We will take the afternoon recess.

(Recess.) [69]

Q. (By Mr. Jacobs): Do you recall what the union representatives said to the representatives of the publishers at that time was that they would accept such a statement in the union contract as a condition of negotiation?

A. They informed us they would be willing to accept the relationship of buyer and seller.

Q. As a condition of negotiation. Mr. Bittler, who drafted the statement in paragraph 1 of the agreement of August 31, 1937, between the union and the publishers?

A. Oh, I am not sure whether it was a mutually drafted section or whether it was a section which the attorneys drafted and submitted to the union. Now, my recollection is, if it is necessary, I suppose that we drafted the original language. I am not sure that that language is identical to what we originally drafted.

Q. By "we" you mean your attorneys?

A. Well, that is the association which the attorneys represented.

Q. Prior to the first meeting with the union in negotiation at which time you represented to them that you would not deal with them except on a basis that they were not employees, had you consulted with your attorneys on that question?

(Testimony of Eugene F. Bitler.)

A. Oh, the attorneys represent the newspapers, of course, all the time. This question had been up at various times. As I recollect, going back to the original, you understand [70] that that meeting with the union was before it actually submitted us a proposal. Now we had that meeting, and they told us that they had authority from the A. F. of L., they had the recognition of the San Francisco Labor Council and that they wished to negotiate for a contract, and we informed them that we would be willing to negotiate with them on the basis of buyer and seller.

Q. I hate to interrupt, Mr. Bittler. I must repeat the question: Did you consult with your attorneys—did you, as the representative of the publishers, consult with attorneys for the publishers and the Publishers Association with respect to this provision in the contract prior to your meeting with the representatives of the union?

A. I assume we did.

Q. And isn't it a fact that they advised you that if the news vendors were to be treated as employees, that the publishers might be liable for workmen's compensation with respect to such news vendors?

A. It wasn't that. I think the attorneys, if I recall, took the position that at that time the courts, the California courts and others throughout the country, had held that news vendors were not employees and that "You shouldn't negotiate with them on the basis of employees and employer."

(Testimony of Eugene F. Bitler.)

Q. I will have to repeat the question again. There was no discussion whatsoever with respect to whether these people [71] would be covered by workmen's compensation if they were employees?

A. There may have been such discussion, but in the last——

Q. Just answer the question.

Mr. Fink: Wait just a minute. I submit he is answering the question. Let the witness proceed.

Mr. Jacobs: The question can be answered yes or no.

Mr. Fink: Just a minute. The witness has a right to explain an answer.

Mr. Jacobs: Let the Court rule upon this.

The Court: Take it easy, gentlemen. I think that the question does call for an answer as to whether or not the subject of workmen's compensation was discussed.

A. It was discussed.

The Court: If that calls for any further explanation, I think you can make it.

A. I would say it was part of the discussion, yes.

Q. (By Mr. Jacobs): And isn't it true that you also discussed at the same time with the attorneys for the publishers or the publishers association that if the news vendors were to be treated as employees, that the publishers might be liable for damages done to people and property in the course of the performance of their duties?

A. It may have come up, but I do not recall.

(Testimony of Eugene F. Bitler.)

Q. Weren't you aware in 1937, Mr. Bittler, that the Social [72] Security Act had been passed and was in force?

A. I may have been. You understand that the attorneys did not meet with the publishers all the time that they were drafting this proposed contract.

Q. I understand that. I asked you if you knew or were aware on August 31, 1937, and at the time of the negotiations with the union, that the Social Security Act had been passed?

A. To my knowledge, it had not.

Q. You weren't aware of the Social Security Act on August 31, 1937? A. No, I was not.

Q. When did you first become cognizant of the Act?

A. Oh, I would say probably in 1940.

Q. Had there been any employees of the San Francisco Publishers Association prior to that?

A. Oh, there had been; I would say that all the employees were covered by it.

Q. Had you paid any tax out of the Social Security Act? A. Myself, yes.

Q. Prior to that time? A. Yes.

Q. Then you were aware of it, weren't you?

A. The Federal Social Security Act?

Q. Yes. A. Oh, sure.

Q. And you were aware on August 31, 1937?

A. Of the Federal Social Security Act?

Q. That is what I am talking about.

A. Yes. [73]

(Testimony of Eugene F. Bitler.)

Q. You were also aware that if these news vendors were to be treated as employees the publishers would be liable for Social Security Tax, weren't you?

A. I would say that if I was aware of the one I possibly was aware of the other.

Q. Now, Mr. Bittler, on direct examination you stated that the edition time of the newspapers was frequently determined by the concentration of the public. Do I understand you to mean that it is important and necessary to the publishers that they have the papers available for sale at the time the public is concentrated on the streets?

A. I would say that it was.

Q. And with respect to street sales, I presume that it is desirable, for instance, that they have an edition available for sale at the time the business offices in downtown San Francisco, let us say, normally close their offices and people start to go home?

A. I would say so, yes.

Q. And the publishers are also aware, I presume, that unless a sale is obtained at that time to these people going home on the streets of San Francisco, it is not liable to be obtained at all?

A. Not necessarily.

Q. You mean they can purchase a paper at home?

A. Sure; in other words, they could subscribe to the newspaper and have it delivered at home.

(Testimony of Eugene F. Bitler.)

Q. But the publishers deem it desirable to obtain sales at [74] the time that the public is concentrated upon the streets?

A. The various edition times, the difference in the news releases, the different headlines which are featured affect the sale of the newspapers and the buyer desiring them.

Q. How long, to your knowledge, have newspapers been sold on the streets of San Francisco through news vendors?

A. Oh, at least eleven years.

Q. You have not been in San Francisco prior to that time? A. No, I had not.

Q. You also spoke on direct examination, Mr. Bittler, of the so-called dirt corners, by which I understood you to mean corners upon which the vendors were not likely to make the amount guaranteed by the union contract?

A. That is right.

Q. And do I understand you also, Mr. Bittler, to say that frequently the publishers undertake to place vendors on those corners to sell their papers, knowing that the news vendors would not make their guarantee?

A. At the beginning, I would say they did.

Q. And isn't it true, Mr. Bittler, that frequently those corners would remain dirt corners for a considerable period of time?

A. Sometimes they would and sometimes they wouldn't. It is all according to the change in traffic and other conditions.

(Testimony of Eugene F. Bitler.)

Q. There have been occasions, have there not, Mr. Bittler, [75] where corners have remained dirt corners for a considerable period of time?

A. They may have, but I am not an operator; I don't know.

Q. You don't know then, how they are sold, as far as the San Francisco papers are concerned, in that respect?

A. As to whether they remained dirt corners or not, I don't know.

Q. Just based upon your familiarity with the newspaper business?

A. In other words, the Ferry Building might be a dirt corner today, whereas a few years ago it was a very good corner.

Q. Is it true that publishers frequently find it desirable to maintain dirt corners to get what you call representation on those corners?

A. That is right. In other words, they are trying to serve all the people in the best manner that they can.

Q. Even though it costs them something, they have to pay something to the vendor.

A. That is right.

Q. Subsequent to the contract of August 31, 1937, were you aware of any declarations of strike by the news vendors union?

A. I do not recall such a declaration.

Q. There could have been a strike declared and you wouldn't know about it?

A. Well, I do not recall after—let me say that

(Testimony of Eugene F. Bitler.)

if there wasn't any organization, I don't see how there could have been a strike. [76]

Q. No, subsequent to August 31, 1937.

A. Oh, subsequent?

Q. Yes.

A. There may have been. I would not say yes and I would not say no.

Q. There could have been and you would not know it? A. Well, I don't recall.

Mr. Fink: May I clarify one thing? Was the question, Mr. Jacobs, as to a strike or a threat of strike?

Mr. Jacobs: I will put it either, in the alternative, a strike or threat of strike.

A. There was no strike; there has been no strike.

Q. Were you aware, as manager of the San Francisco Publishers Association, of any threat of strike subsequent to August 31, 1937?

A. As I sit here now, I would say honestly that I do not recall.

Q. In your capacity as Manager of the San Francisco Publishers Association, would you be interested in that sort of thing?

A. Yes, I would. And, as a matter of fact, we have had several threats at different times from different organizations, so that they are so numerous that I can't keep track of all of them. You understand that if a strike is to occur by a member of the San Francisco Labor Council, it has to be voted upon by the Council itself. The Council usually calls upon the people involved or invites them to the

(Testimony of Eugene F. Bitler.)

Council chambers and they have a discussion of it. It isn't one of those quickies that is called overnight; it is [77] something where there is considerable thought back of it, so that there may have been such a threat. If so, we were notified by the Council, doubtless, of whatever meetings there were. I don't recall any such meeting upon such a threat.

Q. You spoke on direct examination of the importance of circulation to a newspaper. Based upon your familiarity with the newspaper business, Mr. Bitler, will you explain the importance of circulation to a newspaper?

A. I would say it is the life blood of a newspaper.

Q. Is it a fair statement to say that circulation is important first, because of the revenue derived from sales?

A. Well, revenue is important, yes. Representation is also important.

Q. Isn't it true also that the principal source of income for most newspapers is the advertisers?

A. Oh, it used to be. I would say today that the advertisement probably is less important than it was formerly.

Q. In the years 1937 to 1940, would you say that San Francisco newspapers, or most newspapers, derived most of their revenue from advertising?

A. The majority of it, yes.

Q. And isn't it true, Mr. Bixler, that the income from advertising is largely dependent upon the circulation of a newspaper?

A. I would say it is.

(Testimony of Eugene F. Bitler.)

Q. And that the advertisers look to the amount of the circulation, do they not?

A. Well, here if you are selling an advertiser who has a low priced commodity, naturally he is interested in reaching a group of people that is interested in his commodity. Therefore, you are willing to get circulation that will buy his product.

Q. And by circulation, I presume you mean newspapers which are bought by the public?

A. That is right; either bought by the month through the carrier, or bought on the street and taken home by the buyer.

Q. Is that one of the reasons, Mr. Bitler, why newspapers find it important to maintain representation on so-called dirt corners?

A. I would say it was a very important reason, yes, to give full representation to the advertiser.

Mr. Jacobs: No further questions.

Redirect Examination

By Mr. Fink:

Mr. Bitler, I think that inadvertently you made an error in dates that I want to correct.

Mr. Fink: May I have Exhibits 44 and 45, Mr. Clerk?

Q. I hand you defendant's Exhibit A, which is the union proposals submitted June 14, 1937, and No. 5, which is the union revised proposal, which is accompanied by a letter dated October 6, 1938. I do not need that one. I withdraw that question.

Mr. Bitler, looking at the union proposal of June

(Testimony of Eugene F. Bitler.)

of [79] 1937, and having in mind that your first meeting was some time around June 8th or June 9th, can you identify more clearly the first contact with the union?

A. Well, I know we had a meeting around the 8th or 9th, and that was prior to the submission of this proposal which is dated June 14th. It must have been. At the meeting that we held with the union prior to the submission of this proposal, the question then arose as to—as I recall it now, as to the fact as to whether or not the publishers would recognize the union. The publishers stated that they would recognize the union for the purpose of negotiating a contract. At that time they had received an A. F. of L. charter, and they had been—as I stated before, had also received sanction of the San Francisco Labor Council.

Q. And there was no proposal of either party at that original meeting?

A. There was not, no.

Mr. Fink: That is all.

Recross-Examination

By Mr. Jacobs:

Q. A few more questions, if you please. Mr. Bitler, in your capacity as manager of the San Francisco Publishers Association, have you negotiated contracts on behalf of the publishers, the publishers association, with other labor unions?

A. Yes.

(Testimony of Eugene F. Bitler.)

Q. And isn't it true that in every case where there has been any dispute that the members of those unions were employees of the publisher? [80]

A. What was the question?

Q. Isn't it true that in every one of those contracts negotiated by you on behalf of the publishers and the publishers association, that the members of the union worked for the publishers, were the employees of the publishers?

A. On all the contracts except the news vendors agreement, they were all employees, yes.

The Court: Is that all from Mr. Bitler now, gentlemen?

Mr. Jacobs: No further questions.

Mr. Fink: That is all, Mr. Bitler.

(Witness excused.)

WILLIAM PARRISH

a witness for the Plaintiffs; sworn.

The Clerk: State your name to the Court.

A. William Parrish.

Direct Examination

By Mr. Fink:

Q. Mr. Parrish, what is your occupation?

A. I am a news vendor.

Q. Are you a member of the News Vendors Union? A. I am.

(Testimony of William Parrish.)

Q. How long have you been a member of the News Vendors Union?

A. Since the special meeting that was held after the organizational meeting in May.

Q. Of 1937? A. Yes, sir.

Q. Do you now occupy any official position with the News [81] Vendors Union?

A. I am the Secretary-Treasurer.

Q. How long have you been Secretary-Treasurer? A. Since October of 1943.

Q. Have you occupied any other official position with the News Vendors Union?

A. Yes, I have been business agent; I have held the office of President on two different occasions; I have been a member of three or four—I think a total of five standing committees or five negotiating committees. I have been a member of the standing committee on three different occasions, and other committees.

Q. Do you now sell newspapers in the City of San Francisco? A. I do.

Q. Have you sold newspapers in the City of San Francisco since 1937?

A. I have, and prior to that.

Q. Have you sold in cities other than San Francisco?

A. Not for any long period of time. I have sold papers in Chicago, Portland, Los Angeles, over a long period of years of perhaps a week's length, or two week's length of time.

(Testimony of William Parrish.)

Q. Mr. Parrish, were you a member of the negotiating committee the first negotiating committee of the union? A. I was.

Q. Were you a signer of the first contract, Exhibit 4 in evidence? A. I was.

Q. Did you attend the first meeting of the union negotiating committee and the publishers held on June 8th or 9th of 1937? A. I did. [82]

Q. Mr. Parrish, at that time were there proposals either on your behalf, on behalf of the union, or on behalf of the publishers before the committees?

A. We—I will have to explain that. In order to explain it I have to go back to when the committee was first formed.

The Court: Well, I am afraid we are going to get into too long drawn out an answer here. That is a simple question. The attorney wants to know, when you were on the negotiating committee, when you were talking with the Association, whether there were any proposals back and forth which you discussed.

Mr. Fink: No, at the first meeting, your Honor.

The Court: At the first meeting.

Q. (By Mr. Fink): Were there any proposals from the publishers or the union at that meeting of June 8th or 9th, 1937?

A. There was a statement made by the publishers and we had a proposal to present to them. I say a proposal; it was a preamble of the agreement.

(Testimony of William Parrish.)

Q. Now, Mr. Parrish, did the question of the relationship of the News Vendors Union and the members of the News Vendors Union and the publishers arise? A. It arose, yes.

Q. When? A. At that meeting.

Q. Was there a statement of position by the parties at that meeting?

A. There was, by both parties.

Q. By both parties. When, Mr. Parrish, was the news vendors' [83] proposal first submitted? I hand to you Defendant's Exhibit A, the 1937 proposal of the union.

A. It was probably mailed to the Publishers' Association the day before this date, which would make it—perhaps it could have been the 12th. I think we mailed it on a Saturday, if I am not mistaken.

Q. And that is a copy of the 1937 proposal of the union?

A. I would say that it was. I recognize the beginning of the agreement, anyway.

Q. Did the publishers submit a counter-proposal? A. Yes.

Q. And did the Publishers' counter-proposal contain section 1 as we know it in the contracts through the years?

A. That would be a difficult question for me to answer. I am not certain that it did, but I am under the impression that it did.

Testimony of William Parrish.)

Q. Did the negotiating committee for the union accept the principle of Section 1 of the contract of August 31, 1937?

A. The Negotiating committee had accepted that principle before they met with the publishers on either the 9th or 10th of June.

Mr. Jacobs: I move to strike as not responsive everything after the fact that they accepted. Anything further is not responsive to the question.

The Court: Well, I guess that is true. The question [84] was whether they accepted the principle that counsel calls Paragraph 1 of the agreement. I suppose you can say yes or no to that.

A. Yes, they had accepted that, your Honor, but I think it should be qualified.

Q. You mean that there were some qualifications to their acceptance?

A. I mean that the principle was accepted, of the buyer and seller arrangement, before we had ever met with the publishers.

Q. You mean you had agreed among yourselves to accept it? A. That is right.

Mr. Jacobs: I move to strike that as not responsive.

The Court: It is not responsive. I asked it and brought that down on myself. I don't see that it would do any harm. I will allow it in.

Q. (By Mr. Fink): Now, Mr. Parrish, the Court has indicated by previous rulings that it does not deem it necessary or proper to get into a detailed examination as to conversations. And bearing

(Testimony of William Parrish.)

that in mind, do you recall discussions as to the following matters: Do you recall that there were discussions of the matter of the wholesale and retail prices of newspapers?

A. Yes, and very bitter discussions.

Mr. Jacobs: May it please the Court, I understand that your Honor is not bound by what the witness calls a wholesale [85] and retail price. Subject to our objection that we do not admit that there is any wholesale and retail price of these papers, and for the purpose of the record I would like to move to strike those phrases.

The Court: Well, I think the phrases are used—I take it that they are to identify, just as a means of identifying the particular subject matters of the contract.

Mr. Jacobs: If not intended to establish that there was a purchase and sale——

The Court: Neither you nor the other attorneys are going to take away from me the right to decide this case.

Mr. Jacobs: I understand.

The Court: I am not going to be guided by the words you use in that regard, or else there wouldn't be anything for me to decide.

I think you can answer that question.

A. Yes, there were some very bitter discussions.

Q. (By Mr. Fink): In other words, the negotiating committee of the union and the publishers did not agree upon the question of prices?

A. We did not.

(Testimony of William Parrish.)

Q. And it took some considerable time before there was a meeting of minds?

A. The last meeting of the negotiating committee in 1937 answered that or finally solved that problem.

Q. Now, upon the subject of corners or outlets, did that [86] general subject matter come up?

A. It did.

Q. Was it the subject of negotiation through the period of June to August?

A. That occupied, I might say, as prominent a part in the negotiations as did the rate.

Q. You weren't of one mind?

A. Very definitely not.

Q. In the question of guaranty, did that question arise during the negotiations? A. It did.

Q. Was it a subject of discussion?

A. Also very bitter.

Q. And was there an immediate meeting of minds on that subject? A. No.

Q. Mr. Parrish, reverting now to the wholesale and retail prices as provided for in the contracts, have there been changes in those prices since the original contract of 1937? A. Yes, there have.

Q. Have new wholesale prices been negotiated?

A. Yes.

Q. Have the prices of the street corner sales of the Sunday papers been increased since 1937?

A. They have.

Q. How many times?

A. Twice.

(Testimony of William Parrish.)

Q. From what to what, first?

A. The first instance was from ten cents to twelve cents, was the retail price, and the wholesale price from 7½ to 9 cents.

Q. Then there was another change, was there, from 12 cents to something else?

A. From 12 to 15 cents.

Q. And was that change in the price negotiated with the news vendors?

A. Why, certainly; it had to be. [87]

Q. The Sunday newspapers didn't arbitrarily raise the price without negotiating a new wholesale price with you?

A. They can't. They would have no more right to do that than we would.

Q. Do you remember the dates of those negotiations? I mean on the raises in the Sunday papers?

A. I don't remember the exact dates; I could possibly find them for you and have them tomorrow morning.

Q. Thank you. Now, this general question, Mr. Parrish: Following the 1937 negotiations, have the news vendors ever discussed between themselves the subject matter of relationship?

A. There has been instances.

Q. Has the News Vendors Union ever taken any action other than to support the buyer and seller relationship?

Mr. Jacobs: Objection; I do not think it is material whether they took any action or not. Further-

(Testimony of William Parrish.)

more, it is contradicted by the evidence already in Defendant's Exhibit A and Exhibit 44.

The Court: What point of time are you talking about now? You didn't specify any time.

Mr. Fink: No, your Honor, I asked it as a general question. I will withdraw it and reframe the question.

Q. Has the News Vendors Union ever voted upon the subject of the relationship problem?

A. I can recall only one instance where such a vote was taken, which in one sense [88] of the word wasn't a true vote.

Q. And that was when, Mr. Parrish?

A. That was prior to the beginning of negotiations in 1938.

Q. And do you know the result of that vote? Do you recall the result of that vote?

A. The report of the negotiations committee was approved.

Q. And that report was what?

A. Was that we ask the publishers for recognition as employees.

Q. And they did submit an employee proposal in 1938? A. Yes.

Q. And, Mr. Parrish—I know this is going to produce an objection, your Honor—can you state why there was an employee proposal made by the union in 1938?

Mr. Jacobs: He anticipates correctly there. There certainly is an objection.

Mr. Fink: We knew that.

(Testimony of William Parrish.)

The Court: I don't see why, what the reasons for doing something that was done, how they are material.

Mr. Fink: Your Honor, I don't want to waste a lot of time on it, either, but I want to submit this observation to you. There is a lot of jockeying in negotiations. I don't know; I suppose you in your experience have been through it. There was a particular reason for their presenting this employee proposal.

The Court: Yes, but it wouldn't help me to decide the [89] question. Maybe they thought that that would be a kind of a club that they could withdraw and then get something else that they wanted.

Mr. Fink: That is exactly it.

The Court: I know what you are getting at.

Mr. Fink: That is exactly it.

The Court: But that isn't going to help me to decide this case.

Mr. Fink: I will withdraw the question.

Q. Mr. Parrish, other than that one instance of 1938 the matter of the relationship has never again been before the union?

A. When you say the matter of relationship and mean, has the question of buyer and seller ever been taken to a vote, you are perfectly right; it has not.

Mr. Fink: May I have the answer read? I missed a part of it.

(Testimony of William Parrish.)

The Court: He says in substance: If you are referring to the buyer and seller relationship having been put to a vote of the union, it has not.

Mr. Fink: Thank you.

Q. Mr. Parrish, in consideration of the 1937 contract which was signed on August 31, 1937, was the contract, the full contract, thereafter submitted to the union? A. Yes.

Q. Was it considered by the union?

A. Yes; and for [90] the information of the Court, one thousand copies of that was run off on a mimeograph machine on the Saturday night prior to the meeting by the negotiating committee, and each member of the union had a copy of it to peruse while it was under consideration.

Q. How did the union proceed in its consideration of the contract. A Section by section.

Q. Was Section 1 of the contract explained and discussed at that union meeting?

A. I would say that every section was discussed. It took two meetings to handle that.

Q. Were the other sections of the contract separately read and separately discussed.

A. Each section of the contract was separately read and separately discussed.

Q. Did the union finally approve the contract as adopted by the negotiating committee?

A. They did.

Q. And the publishers? A. They did.

(Testimony of William Parrish.)

Q. Do you happen to remember the vote by which the contract was approved?

A. I think or believe that the vote was around 7 or 8 to 1. I have it in the original minute book of the union, which is on the desk there by Mr. Ladar.

Q. Now, were you a member of the 1939 negotiating committee? A. I was.

Q. Were you a member of the 1944 negotiating committee? A. I was.

Q. I notice that you are not a member of either the 1940 or [91] 1942 committee.

A. That is incorrect. I was a member of the 1940 committee, and prior to the presentation of the proposal of the union to the publishers I submitted a minority report. Upon the failure of the union to adopt that report, I withdrew from the committee.

Q. What did your minority report concern?

A. It concerned the guaranties, hours of sale, and one other matter; I think that had some concern with racks.

Q. By the way, Mr. Parrish, the union at its inception was interested in the subject of competition. Will you explain that to the Court, what competition did the union vendors have?

A. We had lots of competition—competition by boys in some instances; competition by racks; other instances competition by the fact that there were too many vendors selling papers on the streets of the City and County of San Francisco.

(Testimony of William Parrish.)

Q. And it was your objective to reduce that competition? A. Certainly.

Q. Do the profits of the other vendors increase as the competition is diminished?

A. That is right.

Q. Let me ask you this question, Mr. Parrish—and I have in mind the entire five contracts—can you give us an indication, or give the Court an indication of the number of vendors who make in excess of the guaranty profit appearing in the contracts? [92]

Mr. Jacobs: Let us have that first confined to a certain period before I consider any further objections. I didn't hear any point of time in the question.

Mr. Fink: There isn't any. It is a specific subject. There wasn't any.

Mr. Jacobs: I will object to that unless it relates to the taxable period.

Mr. Fink: I think the latter part of that is perfectly good. I think I should relate it to the taxable period. The taxable period, if your Honor please, runs through the contract or up into the contract of 1939. It runs into three contracts; it runs into the 1940 contract.

Q. Having in mind, Mr. Parrish, the 1937, the 1939 and the 1940 contracts, can you give us some estimate or some approximation of the number of your members who have profits in excess of the guaranty?

(Testimony of William Parrish.)

Mr. Jacobs: Objection, your Honor; in the first place, the main point of the objection is that the best evidence of what vendors did or did not make the minimum guaranty is the books and records of the publishers.

The Court: I suppose that is true. Do you want to prove this with some particularity, or are you just making some general observation?

Mr. Fink: I am trying to get a picture of just what it means with the membership, your Honor; I am not trying to [93] pursue it with particularity. If the witness knows, I want to get an approximation of the number of vendors who make in excess of the guaranteed profit. There is no intent of pursuing it. We would be here until July 4th of next year if we went into it with every vendor.

The Court: Do you object to it on that point?

Mr. Jacobs: I would like to have a figure too, your Honor, but I want to see an accurate figure rather than an estimate of this witness.

The Court: Well, I think that the objection is really good, Mr. Fink. I think what you are getting at is, you want to know whether there is any substantial number that make over the guaranty; whether there is a greater number that make over the guaranty than those who just make the guaranty; is that what you are getting at?

Mr. Fink: That is it.

The Court: Some general condition?

Mr. Jacobs: I would like to have that information myself, and I think the Court should have that information, but I think it should be accurate.

(Testimony of William Parrish.)

The Court: If that is the case, the objection that it is hearsay is good, unless there is some record.

Mr. Fink: I am perfectly willing to get at it another way. If your Honor please, I thought that we might shorten it. This gentleman, I think, knows. He has been in an official [94] position with the union and he knows what the facts are.

Q. By the way, reverting to the 1937 contract, was the subject matter of hours of selling introduced at the negotiations? A. Yes.

Q. And was it some time before there was a meeting of minds? A. Quite some time.

Q. You finally crystalized on a mutually agreeable period? A. Yes.

Q. By the way, you described the manner in which the 1937 contract was considered by the union. Were the contracts of 1939, 1940 and 1942 and 1944 considered in the same manner?

A. No, we did not in 1939 and 1940—and I imagine in '42, although I wasn't in San Francisco at the time—nor in 1944 every member didn't get a copy of it.

Q. Was that the only difference?

A. That is during the time of the consideration. Immediately after adoption we had copies drew up—that is, printed.

Q. The subsequent contracts were all considered section by section, were they?

A. That is right.

Q. Was each one of those subsequent contracts ratified by the union? A. They were.

(Testimony of William Parrish.)

Q. Mr. Parrish, how do newspapers reach the vendors for sale on the streets?

A. They are delivered to them to, oh, 99 per-cent of the corners, by wholesalers.

Q. You mean men who drive automobiles that are loaded with [95] papers make the actual delivery? A. That is right.

Q. Do these wholesalers deliver more than one edition to the various vendors? A. Yes.

Q. Do you see the wholesaler again after he delivers an edition until he comes around with another edition?

A. He might possibly drive back by a corner at which you are selling on his way back to the plant.

Q. But he doesn't stop at all? A. No.

Q. Do you contact or are you contacted by any other employee of the publishers except the wholesalers?

A. I don't believe so. I mean, speaking for myself personally as a vendor.

Q. You have sold papers in San Francisco upon many corners, isn't that correct?

A. That is right.

Q. Is that true of your selling experience?

A. It has been, yes.

Q. You are not contacted by anybody but the wholesaler?

Mr. Jacobs: He said he didn't believe so; he didn't say he wasn't.

A. I qualified that to speaking for myself personally as a news vendor.

(Testimony of William Parrish.)

Q. (By Mr. Fink): Now, Mr. Parrish, after the papers are delivered to you, what do you do?

A. Offer them for sale.

Q. Well, how do you offer them for sale? [96]

A. Personally, I stick them under my arm and stand out there at 19th and Lincoln Way on that island, and whenever a car stands I ask them which they want, if they say the Examiner I give them the Examiner, and if they want a Chronicle I give them a Chronicle.

Q. Do you do that in any manner?

A. It so happens there is only one manner to do it.

Q. Does anybody tell you how you must offer the paper? A. No.

Mr. Jacobs: The question has been asked and answered; he says there is only one manner in which it can be done.

The Court: I will allow it. You aren't given any directions, are you, as to how you shall sell the papers? A. No.

Q. (By Mr. Fink): Are you told how you are to hold the paper? A. No.

Q. Are you instructed as to your manner of delivery of the paper to the purchaser?

A. No. The delivery of the——

Q. How is that?

A. I would like to have that question again.

Q. Well, are you instructed as to the manner in which you are to deliver the paper to your customer?

A. You mean hand the paper to them?

(Testimony of William Parrish.)

Q. Yes. A. No.

Q. Who determines the number of papers that you take, Mr. [97] Parrish?

Mr. Jacobs: That calls for his conclusion.

Mr. Fink: Just a minute, please. I am slow, I know, but let me get it out.

Mr. Jacobs: I apologize.

Q. (By Mr. Fink): Who determines the number of papers that you order each day or each edition, Mr. Parrish?

Mr. Jacobs: Objected to as a conclusion, who determines.

The Court: I will overrule the objection.

Q. (By Mr. Fink): You may answer under the Court's ruling.

A. Well, I order the number of papers that I feel that I can sell.

Q. Does anybody tell you how many you must take?

A. No, but I will qualify that by saying this: that the corner at 19th and Lincoln Way is an established corner and has been, and over a period of time approximately the same number of papers are sold on the first edition night after night. There are some changes, possibly due to heavy rain or perhaps a better story breaks—that is, a big story, that would cause a difference in the amount of papers that you would get. I receive on the first—what they call a runner—that is, a wholesaler who has no connection with the vendor except to bring the first edition or part of the first edition to him,

(Testimony of William Parrish.)

he drops fifty papers on the corner, then he goes on around and he drops papers to the stores. [98] I believe he is a store delivery man. Now, I get that fifty brought; I do not order it; it is not a question of ordering; it is, you might say, a starting amount, so that I will have my papers around the approximate time that I can begin selling. Otherwise, if I had to wait for the regular wholesaler, to arrive at the corner, it would mean that I would lose approximately forty-five minutes selling time, which would be a loss to me.

Q. And then, after that period, you order the number of papers which you determine that you can sell? A. That is right.

Q. Do you pay for all the papers that you order?

A. I check in on the delivery of the last edition.

Q. What do you mean by check in?

A. Well, I pay for all the papers that I am charged with that day.

Q. And what is the manner of payment? How do you pay? Do you pay in cash?

A. Certainly.

Q. And that is true as to all papers taken by you?

A. With the exception of Saturday night.

Q. Do you have a return privilege?

A. I did.

Q. And do you sometimes return papers?

A. Quite often.

(Testimony of William Parrish.)

Q. And do you get credit for them?

A. Yes.

Q. So that you pay for the difference between the number that you have ordered and the number that you return, is that [99] correct?

A. That is right.

Q. You pay in cash every day?

A. Pay in cash.

Q. Do you ever sell papers on credit?

A. So far no one has asked for it at 19th and Lincoln Way.

Q. Did they at any other corners that you sold?

A. Oh, yes.

Q. By the way, you are talking of 19th and Lincoln Way. You are selling there at present, is that true?

A. That is right.

Q. Then, take the corner that you were selling during the taxable period 1937 to 1940, did you ever have occasion to sell to men on credit?

A. I sold papers on credit at the S. P. Depot, and I had, I think, seven weekly customers.

Q. Did you ever have a loss on any of them?

A. There has been losses.

Q. Who bore the loss? A. Me.

Mr. Jacobs: Object to this line of testimony; the so-called credit that might have been offered by this witness is immaterial and irrelevant as to what he does with the papers in that respect.

The Court: Well, I will allow the answer to stand.

(Testimony of William Parrish.)

Q. (By Mr. Fink): By the way, have you ever had papers stolen? A. Yes.

Q. Who bears the cost of papers that are stolen?

A. I do. [100]

Q. You pay for them if they are stolen?

A. I will qualify that. If papers are delivered to the corner which I have a contract to sell at prior to the time which I am to begin selling, under the terms of that agreement I only pay for the number of papers that I find on the corner when I arrive. Now, all the papers that are delivered after I arrive, if I leave the corner for any reason whatsoever and I leave a hundred papers there and somebody stole them, that is just my tough luck.

Q. Do you receive any orders from the wholesalers? A. No.

Q. That call upon you? A. I haven't.

Q. Do you receive orders from anyone else connected with the papers for which you sell?

A. I haven't.

Q. By the way, what papers have you sold during this period that you have described?

A. Well, I have sold the Call; I have sold the Examiner; I have sold the Chronicle, and I have sold the Chronicle and the Examiner.

Q. You have quite a wide variety. Eliminating the wholesaler, do you receive orders from anyone else connected with the publisher? A. No.

Q. How are corners or sales outlets allocated to the vendors?

(Testimony of William Parrish.)

A. A great many of the corners have been in, you might say, possession of the vendors over a period running from ten years up to as high as twenty or twenty-five years. Other [101] corners that vendors have obtained under the agreement since 1937, from 1937 to the assigning of the agreement in 1939, whenever a corner became vacant any vendor had the right to apply for that corner and if he was in good standing he was given a contract for that corner. In 1939 we changed that condition—that is, during the 1938-39 negotiations we changed that particular section of the contract, and contracts were let through the office of the union. The publisher notifies the union of a vacancy, and the union gives to the publisher a list of available people; then the publisher selects from that list the person to give a contract to for that corner. That was the way the thing started out. It hasn't worked out that way.

Q. How does it actually work?

A. Well, as a matter of practical——

Mr. Jacobs: I would like to have the question identified in point of time. It is a very important question.

The Court: When you say, "It isn't the way it has worked out," what period are you referring to?

A. After about, I would say, two or two and one-half months after the 1939 contract was signed, your Honor.

The Court: Go ahead.

(Testimony of William Parrish.)

A. We found that the union at all times knew of vacancies prior to the time that the publishers did. The reason for that principally, with the exception of those corners that [102] became vacant the night before, would be that, for instance, the Examiner and the Chronicle, the street man—the street man is a different person from the circulation manager—generally doesn't arrive at the plant until about, oh, an hour before press time. That is the time the papers start to roll.

Well, in order for the vendor to notify the street man that he wasn't going to be there, he had to wait until that particular time. Now, it might be that during the course of the day this particular vendor would want to leave town or go somewhere. He could always get the office of the union, and as a practical matter we found, and the publishers agreed, that there was one requirement in the contract or one section of the contract which called for the vendor to notify the publisher whenever he was unable to sell any day or night, and as a matter of practical operation, we agreed that he would notify the union and then the union, in turn, would notify the publisher that the corner was vacant. And that has been the practical operation since about that time.

Q. (By Mr. Fink): And has that resulted in a difference in the allocation of the individual vendor to the individual corner?

A. I don't quite understand the question.

(Testimony of William Parrish.)

Mr. Jacobs: I didn't understand the question myself.

Mr. Fink: I will withdraw it and start again.

Q. Has this modification that was agreed upon resulted in [103] any change in the actual placing of news vendors on corners from the original scheme?

A. With the exception of the fact that it makes it more convenient, and then you must realize that—I know that there is only three of the newspapers concerned here, but there are four newspapers in San Francisco, your Honor, and each one of them has a different street man and each one of them's idea of how he is going to run the street, you might say, differs.

While I was business representative of the union I can remember no more than three occasions where the Call-Bulletin selected anyone for any corner that was vacant.

Q. (By Mr. Jacobs): What period was that, Mr. Parrish, please?

A. That was 1939-40. I can recall at no time that Tony Baccoccio—I would call him up and say "I have got a corner vacant"—or various corners vacant.

"Got anybody up there?"

"Yes."

"Fill them."

There has been an occasion where that was done on The News. There has been other occasions where The News selected the vendor.

(Testimony of William Parrish.)

Now, you have a different problem on the Examiner and Chronicle than you have on the Call and News. And I might say that during the years which apparently we are concerned [104] with here, the Examiner and Chronicle was consolidated about 98 per cent, your Honor.

Mr. Fink: The word "consolidated" there, your Honor, means one vendor selling both papers.

A. That is what we call a consolidated corner. And I don't know whether the publishers didn't trust each other or not, but they divided up the period of time when the selection for contracts would be utilized by the two papers. I think it started at the Examiner and Chronicle—or the Examiner, rather, first took the first six months, or they took the period of time up until July 1st, I believe, and then the Chronicle took over July 1st to January 1st, and that has been the practice since then. But with this understanding; that if the Examiner was doing the selection for contracts, the Chronicle was paying off guaranties, if any.

Q. Mr. Parrish, do vendors sometimes lose their locations or corners?

A. Yes, for breach of contract.

Q. What is that?

A. For breach of contract.

Q. What is that?

A. For breach of contract.

Mr. Jacobs: I move to strike out his volunteer statement in the nature of propaganda. Let him confine the answer to the question.

(Testimony of William Parrish.)

The Court: Yes; "for breach of contract" may go out.

Q. (By Mr. Fink): The fact is that vendors sometimes do lose their contracts or outlets, is that correct? A. Yes. [105]

Q. What are the reasons why a vendor will lose his contract, just generally?

A. Drunkenness, failure to check in, failure to show up on the corner.

Q. Those are the general causes?

A. Yes; it is failure, you might say, to carry out the terms of the agreement.

Q. Are the news vendors dismissed by the publishers?

A. I don't know whether you would use the word "dismissed" or not. They lift the contract that the vendor possesses, whether it happens to be written or oral.

Q. Is there a discipline procedure that the union has of its own? A. Yes.

Q. Do you discipline members for drunkenness? A. We do.

Q. On the corners? A. We do.

Q. Do you discipline men for not showing up on the corners? A. We do.

Q. Do you discipline men for not paying their bills? A. We do.

Q. Do the publishers have anything whatsoever of any kind or character to do with that discipline? A. They do not.

(Testimony of William Parrish.)

Q. Do the wholesalers discipline vendors?

A. The wholesalers have absolutely no standing under the agreement which we have with the publishers.

Mr. Jacobs: I think I would rather have the Court [106] interpret that agreement than the witness.

The Court: I think that is right. The answer may go out. You may ask him for an actual situation.

Q. (By Mr. Fink): Well, do you know of any instances where wholesalers have disciplined the vendors?

A. There has been situations where it was done. As a matter of fact, here some few months ago we had a wholesaler fired for doing that.

Q. It doesn't happen except occasionally?

A. Human nature is human nature. Mexican generals, you find them everywhere.

Q. When it does happen, what does the union do about it?

A. We take it up with the publishers.

The Court: I think you are being unfair to the Mexicans in singling them out.

The Witness: I agree with you, your Honor.

The Court: It applies all over, doesn't it?

Q. (By Mr. Fink): What do you mean when you say you take it up with the publishers?

A. Well, under the agreement there is one person——

(Testimony of William Parrish.)

Mr. Jacobs: I must ask the Court to strike everything under the agreement. I again repeat that I think it is the province of the Court to interpret the agreement.

The Court: Yes, I think that the objection is good. Just read the question, Mr. Reporter. [107]

(The reporter read the last question.)

Mr. Fink: I withdraw the question.

The Court: I think that is a little indefinite.

Q. (By Mr. Fink): Is there a procedure by which the union contacts the publishers?

A. Yes. The publishers have a set-up, and it is part of the agreement, whereby on the Examiner one person is designated by the publishers wherein the first instance complaints on the part of the members against the publishers or their agents, or complaints on the part of the publishers against the union, are discussed.

The Court: Isn't he reciting now one of the provisions of the contract?

Mr. Fink: I think, your Honor, he is probably overstepping your ruling, but I think he is trying to relate it to an individual instance and explain what happened.

Q. Are you trying to tell us what happened, or are you trying to interpret the contract?

A. No, there is no interpretation; it is in plain English.

The Court: Well, that is what I was afraid of. I think what Mr. Fink wants to know is for you to

(Testimony of William Parrish.)

state practically what happens, if there is some complaint, whom do you see and how do you go about it?

The Witness: Your Honor, I will give you a concrete example.

The Court: All right. [108]

A. At the corner of Geary and Taylor Mr. McNamee has a contract to sell Examiners and Chronicles. At eight o'clock at night the wholesaler comes by and he gives him 150 papers, and Mr. McNamee says, "I only want a hundred." The wholesaler says, "Take the 150." And Mr. McNamee throws fifty back in the car and says, "I don't want them."

Mr. McNamee, as soon as possible, gets in touch with Mr. Kalock, who is the business agent of the union. Mr. Kalock, as soon after as possible, gets in touch with Mr. Campbell who is the street man and is the person who is designated by the Examiner to settle, in the first instance, beefs such as that, and then the matter is adjusted between Mr. Kalock and between Mr. Campbell.

Mr. Jacobs: I want the Court to appreciate that this is all hearsay. I am not making the objection when it is a question by the Court.

The Court: I am learning something now about how the business goes on.

Have you got much more direct examination?

Mr. Fink: Yes, your Honor. I have considerable further direct examination.

The Court: Well, I think maybe we might adjourn at this time.

(Testimony of William Parrish.)

Do you think we are going to finish this case tomorrow?

Mr. Fink: Finish it tomorrow, your Honor? Was that [109] your question?

The Court: Don't look so astonished at me. I was told that the case was going to take two days.

Mr. Fink: If your Honor please, I am perfectly serious when I say from indications this case probably will run to this time next week. You don't set any trial on Monday, do you?

The Court: No. Well, unfortunately, I have been doing it for two or three years now.

Mr. Fink: On Monday?

The Court: As soon as I get through with my law and motion calendar I am trying some case the rest of the day. The first year I was able to have some time in chambers on Monday afternoon, but not in the last couple of years. That is the only way I can try some of the shorter cases.

Mr. Fink: I am perfectly serious when I say that we will be lucky if we finish this case by a week from today.

The Court: Why do you have to have so much time on this case?

Mr. Fink: If your Honor please, I am in part basing that on what I apprehend will be done by the defendant, and I am giving myself this advantage: that at an appropriate time I propose to tender a stipulation to the attorney for the defendant, which, if he doesn't accept, will prolong the trial. [110]

(Testimony of William Parrish.)

The Court: Would you mean by that that you are going to have a lot of cumulative evidence?

Mr. Fink: If your Honor please, there are three newspapers involved. The operation on each one of the three newspapers is identical with the exception of minor differences which in no wise relate to the main question that we are here to solve. I take it that if the stipulation which will be tendered is not accepted, I will have to put on evidence for each one of the three papers.

The Court: Well, after you have once described for me—you have before me the contract, and you have described the method of operation as this witness has described it, what else is there for me to have before me factually to determine this question? I am not speaking technically, going to complete your record as to each newspaper, but what additional evidence?

Mr. Fink: You haven't heard yet from the publisher. We haven't offered a publisher as yet.

The Court: Are they going to testify any differently than this witness? They are not going to contradict him, are they?

Mr. Fink: If your Honor please, I think that there will be some differences, but there will be no contradictions. There will be some differences and there will be a description of operations.

The Court: That shouldn't take long, should it? When [111] you say the case is going to take a week——

(Testimony of William Parrish.)

Mr. Fink: Well, you asked me, your Honor, what my judgment was, and I have given it. I think we will be here this time next week unless the stipulation which I propose to tender is accepted by the defendant.

The Court: Well, maybe we should have had a pretrial conference in this case.

Mr. Fink: No, the issue is right down to bed-rock as I see it.

The Court: I may stop the trial if that is the case and have a pretrial right now, because I am not satisfied that a case with the issue that has been stated to me to be involved here should take that long, and there are other cases and other litigants who, of course, have an equal if not a prior right to the consideration of the judicial time, and under our rules of procedure that is one of the powers that the Court has. That is why I asked you that question. I don't see that there is any necessity for that sort of thing and for that length of time, and if you think that you gentlemen aren't going to be able to avoid cumulative testimony, why, then I will proceed with the pretrial tomorrow morning, and have an agreement as to just what is going to be produced.

Mr. Fink: May I say that, of course, I know some of the things that the defense has done. I understand, for instance, [112] that they have issued fifty subpoenas. If they submit fifty witnesses here and they produce the carloads of written material that they have asked for, why, my estimate

(Testimony of William Parrish.)

will be exceeded and not diminished. I will say to the Court I will present a total of five witnesses, after which I will tender the stipulation.

As far as the pretrial conference is concerned, I have no objection to it, but nothing will be accomplished from it because we have got the issue down to as narrow as it can be.

The Court: Of course, the Court has the inherent power to refuse to hear cumulative evidence.

Mr. Fink: That is true.

The Court: I don't just have to sit and listen to a repetition of the same thing.

Mr. Fink: That is entirely true.

The Court: Particularly if there is no dispute. I can't see how there can be any dispute as to the manner of operation and the sale of the papers.

Mr. Fink: I am in complete agreement with the Court. I can't either, but the defendant seems to think there is.

Mr. Jacobs: I made no such statement. At the outset of this case Mr. Fink said—I think I quote him correctly—that there is a great deal of that to be taken up in argument. At that time I urged that the Court consider my motion, because I said the contract contains the basic agreement. [113]

I can tell the Court now that I am not going to stipulate that every one of the other papers runs their paper in the same way that Mr. Fink's most able witnesses said that they run that. I would not be performing my duty, representing the Government, if I entered into such a stipulation.

(Testimony of William Parrish.)

The Court: Well, you gentlemen think over the matter, and each of you make some statement in the morning the first thing as to the nature of the evidence that you are going to present, and then we will see from that whether we can come to some agreement as to the trial. I mean what witnesses you are going to present, what those witnesses are going to testify to, because it may be that upon the statement of counsel as to what the witnesses are going to testify, it won't be necessary to present them. That is in your interests as well as, of course, in the interest of the Court, as far as time is concerned.

I pretty much understand what this case is about now—that is, in general. I haven't heard all of the evidence, but I can see what the issue is, and it almost seems to me as if it could be submitted on an agreed statement of facts.

Mr. Fink: On an agreed statement of facts? We are so far apart, if your Honor please, we couldn't——

The Court: As to the manner in which the newspapers are delivered to the men, and how much money they get, and what they make. [114]

Mr. Fink: We couldn't get together on an agreed statement of facts, your Honor, we are so far apart.

The Court: I almost think you could. This is about the third or fourth one of these cases that I have had recently under the Social Security Act. It is always a question of law. The question is, whether

(Testimony of William Parrish.)

these gentlemen, such as Mr. Parrish, are employees or whether they are independent contractors, and that depends upon the contract and upon the manner in which the contract is performed in fact.

Mr. Fink: I say, your Honor, it is a mixed question of law and fact. I do not concede that is a question of law at all; I believe it is very, very much a question of law and fact.

The Court: Of course, that is true of many cases. When you say it is a mixed question of fact and law, you don't really mean that there is any dispute—there can't be any great dispute.—as to the facts in this case.

Mr. Fink: If your Honor please, I do make that assertion seriously to you that there is a dispute as to the facts. The Government has held an administrative hearing on this already and the facts are directly in issue. We are as far apart as the two poles on the facts.

The Court: Do you mean that one witness has testified that the newspapers are sold in a certain manner and another witness testified directly to the contrary? [115]

Mr. Fink: If your Honor please, I am not going to try to tell you what the defendants' witnesses are going to testify to. I don't know. I do know that their assertion is that it is contrary to my witnesses. I do know that to be the fact.

The Court: I think that they will probably disagree with you on the statement of the witnesses that they are independent contractors, because that

(Testimony of William Parrish.)

is the issue of the case, but what the parties actually do in carrying out the contract, I don't think there could be very much in dispute.

Mr. Fink: Your Honor, I can name several instances where there is a disagreement on the factual side. For instance, the very fundamental question of control. They will, I assume, present evidence to you that they believe indicates control. Now, how are you going to get the picture on that?

The Court: That may be. On that matter there might be some conflict, perhaps.

Well, we will sleep over it a little bit and talk about it again in the morning at ten o'clock.

(Thereupon an adjournment was taken until Friday, March 29, 1946, at ten o'clock a.m.)

Friday, March 29, 1946, 10:00 A.M.

(Same appearances.)

WILLIAM PARRISH

recalled.

Direct Examination

(Continued)

By Mr. Fink:

Q. Mr. Parrish, yesterday you testified concerning the payments for papers by you daily. How are those papers charged to you?

A. There is two methods of charging the papers, the method of charging on a daily basis, or the method of charging them on an edition basis.

(Testimony of William Parrish.)

Mr. Jacobs: I am sorry, Mr. Parrish, I did not hear the last.

A. An edition basis. In other words, the publishers' representative, the wholesaler can collect under the terms of the agreement after each edition, or at the end of the selling period.

Q. (By Mr. Fink): Do they charge the papers to you at a 100 copy basis? A. That is right.

Q. I hand you a printed form. Is that a form used in the distribution of the papers?

A. This particular form here, I am not certain whether it is being used at the present time or not. It was a form which was designed to take care of a [117] situation which arose.

Mr. Jacobs: Before the witness testifies, may I see it, so I will know what he is talking about?

Mr. Fink: Certainly.

Q. Now, Mr. Parrish, is this the form that you referred to yesterday, I think, in your testimony as a sales slip? A. That is right.

Q. And that is used in the accounting between the vendor and the wholesaler. Is that correct?

A. Yes, it is the recognized record of sales.

Q. You get a copy of this slip at the end of each edition, or the end of each day. Is that correct? A. At the end of each day.

Mr. Fink: I would ask, if your Honor please, that that form, to complete the record, be introduced in evidence and be given the next number.

Mr. Jacobs: No objection.

(The document referred to was marked Plaintiff's Exhibit No. 46 in evidence.)

(Testimony of William Parrish.)

Q. (By Mr. Fink): Now, at what price do you sell the papers?

A. The retail price established by the agreement.

Q. For daily papers that is what?

A. Five cents.

Q. For Sunday papers it is what?

A. Fifteen cents.

Q. Now, what becomes of the difference between the price at which the papers are sold to you per 100 copies and the retail [118] price at which you sell them?

Mr. Jacobs: May it please the Court, I don't want to interrupt the testimony, but all this is covered expressly in the contracts already in evidence. If the Court is interested in saving time, I think this testimony serves no useful purpose.

The Court: Is there any conflict about the fact that the papers are sold at prices specified in the contract?

Mr. Fink: If your Honor please, yes. At least upon two or possibly more occasions yesterday Counsel for the defendant denied that there was such a thing as a wholesale and retail price, and I am certain the Court will remember that observation in at least two instances, possibly more.

Mr. Jacobs: And we still deny it. My point is that the testimony does not make or unmake the law, whether there was a sale or not.

The Court: I don't quite follow you on that.

Mr. Jacobs: Yesterday we asked the Court to note that we did not admit there was a sale of papers

(Testimony of William Parrish.)

and moved to strike the reference to wholesale and retail prices because we do not admit, as plaintiffs contend, that papers are sold to the vendor. In the last analysis, we said, that even if they are sold, it is still an employment relationship. We don't admit that this witness or any other witness can say when papers are sold to the vendor. The terms of the contract [119] cover that.

The Court: He is testifying what is being done.

Mr. Jacobs: Yes, but he is referring now to wholesale and retail prices. That is something for the decision of this Court, not this witness.

The Court: That is just what Mr. Fink is asking about.

Mr. Jacobs: I withdraw the objection.

Mr. Fink: Will you read the question.

(Question read by the Reporter.)

A. I retain it as my profit.

Mr. Jacobs: Does your Honor understand my point? I move to strike the phrase "keep it as my profit." We don't admit it is a profit.

The Court: But a man can testify that somebody brings him a paper, he pays the man who brings it so much money, and he sells it to someone else for so much.

Mr. Jacobs: And keeps the difference.

The Court: That is what he is testifying.

Mr. Jacobs: He went further; he called it "profit."

The Court: How it is designated, that is a matter for your argument.

(Testimony of William Parrish.)

Mr. Jacobs: That is my only point, your Honor.

Q. (By Mr. Fink): Mr. Parrish, after the papers are delivered to you by the wholesaler, are you free to do what you want with these papers?

A. Yes.

Q. Can you give them away if you want to?

Mr. Jacobs: Objection. That is contrary to the provisions of the contract. The contract especially requires all unsold papers to be returned to the publisher.

Mr. Fink: Read that section. It does not say anything of the sort.

The Court: What section is it?

Mr. Fink: It says they "may" be returned.

Mr. Jacobs: Paragraph 14 (a) of the 1937 agreement.

Your Honor will note it says:

"All unsold papers shall be returned in accordance with the requirements of the Publisher."

The Court: Now, aren't you trying to vary the terms of that agreement?

Mr. Fink: Your Honor, I am trying to show what actually happened. If there is an executed oral agreement between the parties, I say it is perfectly good as a modification of the agreement.

Mr. Jacobs: I submit that is in direct violation of the parole evidence rule.

Mr. Fink: If there is an executed oral agreement as between the parties as to what their actual practice was, what they actually did, the master con-

(Testimony of William Parrish.)

tract which is not the contract, as we will show in a minute under the examination here. [121]

The Court: Your question was, he can do anything he wants with them?

Mr. Fink: That is exactly right.

The Court: I think the objection is good to that question. That is directly contrary to the provisions of the contract.

Q. (By Mr. Fink): Mr. Parrish, I hand you a printed form. Do you recognize it? A. Yes.

Q. What is it?

A. It is the contract between the individual vendor and a publisher.

Q. And were those contracts in use in San Francisco? A. Yes.

Q. How long were they in use?

A. I cannot be definite on this, but I believe that some time, either in late 1938 or early 1939, the Union reached an agreement with the publishers that it would be no longer necessary to put out the printed form of contract. That oral contracts on the basis of this would be given, to my best recollection.

Mr. Fink: If your Honor please, I ask that there be introduced and given the next consecutive number, the contracts that were just identified by the witness.

Mr. Jacobs: No objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 47.)

(Testimony of William Parrish.)

Mr. Fink: Your Honor, may I state for the record, rather [122] than reading Exhibit 46, it is merely an accounting slip between the publisher and the wholesaler and the vendor, for the purpose of the record I desire to read into the record Plaintiff's Exhibit No. 47, the News Vendors contract.

"The undersigned publisher and news vendor hereby agree that said news vendor shall sell at the corner designated below in accordance with the terms of the contract between San Francisco Newspaper Publishers Association and the News Vendors Union No. 2769, American Federation of Labor, date.....

.....
Publisher,
.....

News Vendor."

The Court: That does not seem to be exactly the language of the form attached to the complaint as I have read it. The form attached to the complaint is supposed to be a copy of that?

Mr. Fink: If your Honor please, there is not a form attached.

The Court: Yes, it is attached to your complaint as Exhibit 3, which is a copy of the agreement, the master agreement, and the last page of that is the contract referred to, but it does not seem to follow that language.

Mr. Fink: No, if your Honor please, this was the individual contract which was in use.

(Testimony of William Parrish.)

The Court: The form of contract which you attach to the complaint is not precisely in that language. [123]

Mr. Fink: May I have Exhibit 4, please?

The Court: That is in the copy I am reading; in case No. 25230.

Mr. Fink: Yes, your Honor, it is attached and is slightly different. However, that card is what was used.

The Court: Very well.

Q. (By Mr. Fink): Now, Mr. Parrish, under your selling contract in 1937 and subsequently, did you always—I will withdraw that.

Mr. Parrish, under your selling contract in 1937 and subsequently, were you free to do as you wanted with the papers?

Mr. Jacobs: An objection, your Honor. That is provided for by the contract. It is the same question stated before.

The Court: I will sustain the objection.

Q. (By Mr. Fink): Mr. Parrish, did you always turn in all the papers that you had unsold?

Mr. Jacobs: The same objection, your Honor. It is immaterial whether he did or not. It is one provision of the contract that the publisher could require him to. It is the right of the party, not what he did in that respect, that is the vital thing.

The Court: I think Counsel's point is good. I will sustain the objection.

(Testimony of William Parrish.)

Mr. Fink: Well, may I be heard a minute, your Honor, on [124] that? One of the pertinent objections to the relationship here is that the news vendor is not a free agent, that he may not—let's put it the other way, that there is no completed sale. We contend that there is a completed sale, and we are prepared to show by this witness that there is a completed sale and that all the newspapers are delivered to him to do precisely what he wants with them. If he wants to take and throw them in the Bay, then pay for them.

The Court: Well, I understand what you are getting at, but the rights of the parties are measured by what was agreed to. If one party does not carry out the terms of the contract, that does not vitiate the rights granted by the contract itself.

Mr. Fink: If your Honor please, I am addressing myself to the individual contract of the vendor. That is different from the master contract.

The Court: No, because the individual contract specifies it is made pursuant to and in accordance with the terms of the contract between the Publishers Association and the American Federation of Labor.

Mr. Fink: Your Honor, I now offer to prove through this witness that there is a completed sale of newspapers daily to him, and I offer to prove that upon that completed sale the news vendor is a free agent, that he is able to, upon his own initiative, sell the newspapers he purchased, give [125]

(Testimony of William Parrish.)

them away, destroy them, or otherwise do as he wants with them.

The Court: Well, the Court would adhere to the ruling. The ruling is based upon the contract between the parties. It measures their rights and liabilities, and parole evidence is not admissible except for the purpose of explaining some ambiguous or similar condition in the contract.

Mr. Fink: We are not entitled to show that there was an executed oral contract varying the terms of the master contract?

The Court: Well, I would not consider what you are asking for is an executed oral contract. If the contract provides that the papers shall be returned to the publisher and the witness did not return the papers, the only significance attached to that is, that he did not perform that term of the contract. Maybe the publisher was satisfied not to have him comply in that respect, but that did not change the contract.

Mr. Fink: I will get at it another way to complete the record on that subject. I am sorry.

Q. Mr. Parrish, as I understand you, the last exhibit introduced was abandoned some time in 1938 or 1939. Was that your testimony?

A. To the best of my recollection.

Mr. Jacobs: Do I understand the agreement was abandoned in 1937 and 1939?

The Court: You mean it expired, I suppose?

(Testimony of William Parrish.)

Mr. Fink: No, I do not, your Honor. I mean the use of the form last introduced in evidence, the use of the form was abandoned in 1938 or 1939.

Q. And that is correct, according to your best recollection? A. That is correct.

Q. How did you proceed after the abandonment of that form in the individual contract?

A. By oral contracts, just that it was understood that it was the contract which the vendor had between the individual publishers.

Q. And this individual agreement was made between the wholesaler and the individual vendor. Is that correct? A. No.

Q. How were they made?

A. Between the publisher and the individual vendor.

Q. Now, did you continue to return papers in the same manner as you did before, under the oral contract?

Mr. Jacobs: If your Honor please, I think the witness—Mr. Fink is trying to get an indirect answer that he could not get directly. This contract and the terms of it are part of the plaintiffs' complaint. This is the basis of their claim for refund, the basis of this suit. Do I understand now that he is trying to repudiate that contract and say there was some other agreement between the parties?

The Court: Well, are you objecting to the last question?

Mr. Jacobs: I certainly do.

The Court: I will sustain the objection. [127]

(Testimony of William Parrish.)

The Witness: Your Honor, may I ask to confer with the friend of the Court a minute? As I sit here and listened to the question and the objection, that section is being entirely misconstrued.

The Court: I appreciate that you have taken an active interest in this matter as an officer of this organization, the matter of the contract, but the lawyers attend to this matter. It is your duty as a witness to just answer the questions. I don't see any point in what you ask. Unless the attorney would like to confer with the witness.

Mr. Ladar: I think during the recess we will have that opportunity.

Q. (By Mr. Fink): Mr. Parrish, are you free to stop selling newspapers at any time?

Mr. Jacobs: An objection, your Honor. Again the contract specifically states they are engaged to sell newspapers and sell them at the times provided.

The Court: I will sustain the objection.

Mr. Fink: Where do you find that?

Mr. Jacobs: Principally on the ground that the contract is alleged to be the agreement between the parties and that measures the rights of the parties.

Mr. Fink: Do I understand the objection was sustained?

The Court: Yes.

Q. (By Mr. Fink): Mr. Parrish, in the selection of corners or [128] outlets, are the vendors free to refuse to accept a contract at a given corner?

A. As far as the publishers are concerned, yes.

(Testimony of William Parrish.)

Q. Are the vendors free to refuse to accept a contract at a given corner or outlet?

A. They are free from any requirements of the publisher.

The Court: You mean by that you don't have to sell papers on a corner if you don't want to sell them?

A. What I mean——

The Court: Well, answer that question. If you don't want to go and sell *The Chronicle* or *The Examiner* at a corner, you don't have to do that.

A. That is correct.

The Court: You don't have to work any place unless you want to.

A. You don't have to sell, no.

Q. (By Mr. Fink): Do you employ substitutes from time to time?

Mr. Jacobs: An objection, your Honor. There again it is immaterial whether they employ substitutes. The question is not whether they have employees, but whether these individuals are employees.

The Court: I think that is going too far afield. I will sustain the objection.

Mr. Fink: May I be heard again?

The Court: Yes. [129]

Mr. Fink: I am trying to establish by competent evidence that these men are free agents. One element of control is that fact, that they are free agents.

(Testimony of William Parrish.)

Th Court: That is a matter for argument. I understand your position in this matter.

Mr. Fink: Your Honor, how am I going to base an argument unless I have something in the record to show?

The Court: Well, you have set up the fact that these parties are acting under a contract and that contract measures the rights of the parties. Now, if that contract is what you say it is, it is a contract whereby the news vendors are independent contractors. Then they are independent contractors, but whether or not they performed the contract or did something in actual practice that is different than under the terms of the contract, merely indicates how they are performing under the contract, but it does not change the rights of the parties.

Mr. Fink: And how they, themselves, are construing the contract, and I say, under the terms of the contract a necessary element to show is that these men did employ substitutes, they did pay the substitutes themselves. We don't even know who they are. And that is part of my case and part of my showing. We exercise no control over the situation at all. It is a necessary element.

The Court: Well, the contract itself provides the manner in which these news vendors are selected, does it not? [130]

Mr. Fink: How they are what?

The Court: I read the contract. Correct me if I am incorrect. I recall a provision in the contract which says the Union shall furnish a list of

(Testimony of William Parrish.)

names, and the newspapers are free to select any of the persons listed in that list, free to select them. If they don't like them, then they can ask the Union to submit other names. Am I correct about that?

Mr. Fink: In substance you are correct, yes, sir.

The Court: Now, that provision measures the rights of the parties.

Mr. Fink: I respectfully disagree with the Court. It does not do anything of the sort.

The Court: All that it means is, if this witness, for example, sends a substitute and the newspaper makes no objection to him, they accept him under the terms of the contract.

Mr. Fink: It is done by them without our knowledge. They employ him; they may do so. We don't know their names; their names never are submitted to us and they do it as a free agent.

The Court: Then, maybe they may not be performing their part of the contract, and you may be accepting that manner of performing the contract. Still, under the terms of the contract there are things to be done. I think, Mr. Fink, you have made your position clear and the discussion we have had is in the record and shows the basis of the ruling. You are [131] protected so far as the record is concerned on what you are endeavoring to show.

Mr. Fink: I desire, if your Honor please, to make an offer of proof.

The Court: All right.

(Testimony of William Parrish.)

Mr. Fink: Your Honor, I offer to prove by the witness, William Parrish, that the news vendors in San Francisco on the corners employ substitutes; that they employ substitutes of their own choosing; that the publishers have nothing to do with the substitutes who are employed; that the news vendors themselves have substitutes where substitutes are employed, that we do not know the names of these substitutes; that this course has been pursued from the inception of the 1937 contract down to date and still exists.

May I add to that one addition? The statement of the offer, may it continue, with the permission of the Court: And that insofar as the guarantee is concerned, if the guarantee provision of that contract becomes applicable, the publishers do not know the means and methods of allocating the guarantee.

Q. Mr. Parrish, can you news vendors sell other articles than newspapers?

Mr. Jacobs: I object to that as expressly covered by the contract.

The Court: Well, you are asking whether they can do something. [132] That calls for his conclusion and an interpretation of the contract. You can ask what he does.

Mr. Fink: I think you are right. The question was badly worded.

Q. Do the news vendors in San Francisco sell articles other than newspapers?

(Testimony of William Parrish.)

Mr. Jacobs: Objected to as immaterial whether they did or not, because the rights of the parties to sell other newspapers is covered by the contract.

The Court: It provides they can, does it not?

Mr. Jacobs: They can only if the publishers permit. Paragraph 1 covers that. I point out that the specific contract between the individual vendor and the publisher determines whether he sells that paper. Paragraph 10 provides:

“The Publisher (or Publishers, if such corner be a consolidated corner) shall designate each corner whether full time, part time, special wrapped edition corner, or a special event corner where the newspapers produced by it or them shall be sold, and each of said publishers shall in its or their discretion contract for the sale of said newspapers (other than special wrapped editions) upon a basis of exclusive representation or joint representation, as the Publisher (or Publishers, as the case may be) shall determine.”

The Witness: I believe Section 25 is where the matter [133] is really covered.

The Court: There is no such section.

The Witness: One of the last sections before the set-up for the signing committee, and so forth.

Mr. Fink: Section 20, if Your Honor please, is the section in the 1937 contract. I think it be-

(Testimony of William Parrish.)

comes something else in a later contract. Section 20 reads:

“News Vendors coming under the terms of this agreement and selling any newspaper or newspapers produced by the Publishers or any of them and at the same time offering for sale other newspapers, magazine, or publications, shall not be guaranteed any profit under the provisions hereof.”

The question pending is, Do the vendors sell other articles than newspapers?

Mr. Jacobs: What contract?

Mr. Fink: 1937.

Mr. Jacobs: You refer to which paragraph of the 1937?

Mr. Fink: Turn to Section 20.

The Court: Now, what is the question, Mr. Fink?

Mr. Fink: Do news vendors sell other articles than newspapers?

The Court: You mean do all of them?

Mr. Fink: No.

Mr. Jacobs: There is an objection, Your Honor.

The Court: Well, I don't see any objection to that. It is harmless.

The Witness: A. I, myself, personally sell nothing but newspapers.

Q. (By Mr. Fink): Mr. Parrish, from your experience as business agent and the present secretary and treasurer of the Union, do you know

(Testimony of William Parrish.)

of your own knowledge whether other news vendors sell articles other than newspapers?

Mr. Jacobs: The same objection, Your Honor. Whether they can or cannot sell.

The Court: He did not ask that. He asked whether they did.

Mr. Jacobs: I withdraw the objection.

A. Yes, Your Honor, on a great many——

The Court: Just answer the question, please.

A. Yes.

Q. (By Mr. Fink): Do you know of your own knowledge that other news vendors sell magazines?

A. Yes.

Q. Do you know of your own knowledge that others news vendors sell these 25 cent pocket books?

Mr. Jacobs: An objection, Your Honor, to the whole line of inquiry. It is trying to get indirectly into the record that these people do sell other things.

The Court: Well, if they do, there is no harm in that. Still, it would not make any difference in the interpretation [135] of the contract.

Mr. Jacobs: I will point out that Mr. Fink is trying to find out here that the vendors had an independent choice. That is covered by the contract.

The Court: The contract provided that he did not get a guarantee if he did.

Mr. Jacobs: It also provides that they may not sell other things.

Mr. Fink: That is not true. Section 10 is not the section. Section 20, they must be read together.

(Testimony of William Parrish.)

Mr. Jacobs: Section 20 provides that if they are granted permission to sell other things then they are not entitled to the rights of the guarantees.

Mr. Fink: Where is there anything about permission in Section 20? Just point out where there is anything about permission.

Mr. Jacobs: I will address myself to the Court.

The Court: There is no use getting worked up.

Mr. Fink: When these statements are made by the Government's representative, I feel I have a right to point out, through you. Where is there anything out about permission?

The Court: All right, you gentlemen don't have to quarrel over this. There is a question of law involved. You don't have to get so excited.

Mr. Fink: I cannot let misstatement go in.

Mr. Jacobs: I am not going to quarrel as to whether there is a misstatement. I want to read from Section 10, if I may, with the permission of the Court.

The Court: All right.

Mr. Jacobs (Reading): "The Publisher (or Publishers, if such corner be a consolidated corner) shall designate each corner whether full time, part time, special wrapped edition corner, or a special event corner where the newspapers produced by it or them shall be sold, and each of said Publishers shall in its or their discretion contract for the sale of said newspapers (other than special wrapped editions) upon a basis of exclusive representation or joint representation, as the Publisher (or Publishers as the case may be) shall determine."

(Testimony of William Parrish.)

The Court: Of course, I think that provision, does it not, refers to the right of the publisher to determine whether the news vendor shall sell exclusively the paper of the publisher or may be permitted to sell newspapers of any other publisher at the corner.

Mr. Jacobs: I do not understand what you mean.

The Court: The language seems to me clearly to indicate there that the publisher reserves the right to designate whether or not the news vendor shall sell on a particular corner only the newspapers, on that corner, or whether he may [137] on that corner sell as well newspapers of other publishers.

Mr. Jacobs: Exactly, Your Honor.

The Court: This witness is not being interrogated on that subject of whether they can sell other articles besides newspapers, but whether, in fact, he does.

Mr. Jacobs: I still think in the letter and spirit of that contract, he is engaged to sell newspapers of these publishers.

Mr. Fink: That is your interpretation.

The Court: Well, so far as I see the question of law involved, it does not make any difference whether he does sell other articles. That is not affecting the status under the control. That matter is not covered under the contract and he may be free to do that. If he engages, however, in other activities, then he shall not be entitled, under that section, to the benefit of the guarantee.

(Testimony of William Parrish.)

Mr. Fink: The question pending, if it please the Court, is as to whether the witness on the stand, of his own knowledge, knows that other vendors sell these 25 cents pocket books. A. Yes.

Mr. Jacobs: May it please the Court, if there is going to be interrogation on this line, let the witness say who they were, how many.

The Court: It may be vague and the Court will attach to it just such weight as it is entitled to have.

Mr. Fink: I assure this Court that this testimony will be [138] tied tighter than even Counsel wants.

The Court: I don't know why we can't get some stipulation of facts with regard to matters of this kind, subject to its materiality and subject to pertinency to the matter of interpreting the nature of the contract and the relationship. If men do, in fact, sell articles, why do we have to waste a lot of time establishing that fact, leaving the matter of its pertinency and relevancy to later consideration by the Court? It seems to me we are wasting an awful lot of time on matters of fact. Probably, as facts, they are not subject to contraversion.

Mr. Jacobs: I quite agree with you.

Mr. Fink: All right. I offer to stipulate with you. I present to you a series of photographs showing what the vendors sell, which later I will identify. I ask, if Your Honor please, that the photographs, a set of which I just handed Counsel,

(Testimony of William Parrish.)

be marked for identification and be given the next number, A, B, C.

Mr. Jacobs: I have had the pleasure of seeing the photographs.

Mr. Fink: Not all of them.

Mr. Jacobs: They are excellent photographs.

The Court: I think we might shorten this as if it were a pre-trial right now. Are you going to present evidence showing—after all the Court walks around the streets of [139] San Francisco. I suppose I see some of these things, know about them—if there is no controversy about them as matters of fact, there is no use wasting time.

Mr. Jacobs: May I make a suggestion? The publishers should, I am sure they know because some of their records indicate they know what corners magazines are sold upon. The very fact of the contract waiving the provision about magazines, if the contract of the publisher says there are newspapers sold on so many corners and on so many other corners magazines are sold, we are not prepared to dispute that fact.

The Court: Make a stipulation to that. Can you state in general terms how many corners?

Mr. Fink: No, I cannot state offhand. I can produce those figures easily enough, but I point out to you that in response to the Court's suggestion, Counsel now has said if we will produce a competent witness. We have a competent witness right on the stand; here he is. He is one of them. Counsel has accepted the Court's suggestion.

(Testimony of William Parrish.)

The Court: All right. Never mind the witness now, Mr. Fink. You have prepared the case, you are familiar with it. Can you make a statement to the Court of approximately how many corners, make a statement of the facts that the witness is going to testify to?

Mr. Fink: Well, if Your Honor please, I most respectfully ask leave to present the case as I feel it should be presented, [140] in view of the fact that the tender of stipulation is turned down.

The Court: No, I understood Mr. Jacobs to say if that statement will be made——

Mr. Fink: He said a competent witness, Your Honor. That is what he said.

Mr. Jacobs: It does not have to be under oath. If a witness stands up and says, "We sell newspapers on so many corners, and on so many corners magazines are also sold," we won't dispute that. We will accept the statement. We will accept a statement, if you wish, taken from the books and records of the corporation.

The Court: I think that is fair.

Mr. Fink: It is not satisfactory to me. He says if it is taken from the books and records of the corporation. I have the actual evidence by photographs here, and I am prepared to tie it up.

The Court: I am not going to spend the time of the Court in having 50 photographs, one by one, offered in evidence here. Counsel has offered to stipulate with you. Will you accept Counsel's statement as well as the statement of the publishers

(Testimony of William Parrish.)

as to the extent to which this manner of conducting business is carried on? Will you accept Mr. Fink's statement if he says his witness will so testify?

Mr. Jacobs: If Mr. Fink gives me his assurance that the [141] figure is not pulled out of the air, but is a figure in fact taken from the books of the corporation—I don't want a vague estimate of how many corners there are.

The Court: Can you furnish that statement?

Mr. Fink: Yes, I can furnish it.

The Court: It is going to save a lot of time. All that is necessary is for you to get up and say that you have conferred with your client; they tell you their records show there are so many corners in San Francisco where newspapers are sold and so many corners where news vendors are selling other articles besides.

Mr. Fink: Now, Your Honor, the publishers' records do not show any such thing. That is the fallacy and the difficulty of Counsel's offer to stipulate. I was trying to make that point.

The Court: How are you going to prove it?

Mr. Fink: By actual witnesses.

The Court: You mean this witness went around and counted the places?

Mr. Fink: He did not. He is a general witness. I am going to show by actual witnesses exactly the extent of this thing. Let me make this point, Your Honor: We don't know how many sell the scratch sheet. We have no record on that. That is a

(Testimony of William Parrish.)

racing paper. We don't know how many sell the National Turf, all those things. But we do know they are sold. [142] We have no record of it. How can I produce books and records when there are not such? We don't know how many vendors sell these pocket books. We do know that one has a big supply of them on a rack. I am going to connect the evidence, the Court need not worry about that. I am prepared to do it. But we have no books or records on this. My next question is going to be whether he knows the scratch sheet is sold by vendors, the National Turf. I have forgotten the rest of the names. It doesn't make any difference, the Daily Racing Form is another. We have no books and records on that.

Mr. Jacobs: If it please the Court, I have here in my hand a form supplied to me by the representative of the Call-Bulletin which purports to be a wholesale weekly sales report. In the last column there it contains these words, "Write magazines in column if vendor sells magazines". Now, maybe that form is not used, but it would indicate that there is a provision in the books of the Call-Bulletin, at least, where such records could be kept.

Mr. Fink: I am familiar with that form and it is designed to show whether he sells, not what he sells.

The Court: Maybe that would be the answer to it.

(Testimony of William Parrish.)

Mr. Fink: May we get back to the question? I have forgotten which one of the series I had asked the witness.

(The photographs were marked Plaintiff's Exhibit 48 for identification, A, B, C, D, E, F, G and H.) [143]

The Court: Do you want me to take judicial knowledge of the fact that news vendors sell other articles at various street corners in San Francisco besides the newspapers, and that they have been doing that for a number of years?

Mr. Fink: Yes, Your Honor.

The Court: All right. I will take judicial notice of it. You don't need to produce evidence on it.

Mr. Fink: If the Court will permit me to say, I do want the Court to take judicial notice of it, and I do want the Court to take judicial notice of the extent of it.

The Court: Well, if you can make some statement as to the extent of it.

Mr. Fink: I will make a statement. Now, if the Court please, is there going to be an objection to the introduction of these photographs?

Mr. Jacobs: There certainly is.

Mr. Fink: Well, now, they are marked for identification. Then we will get at them another way.

Q. Are there newspaper publishers in San Francisco other than the four daily papers?

(Testimony of William Parrish.)

Mr. Jacobs: Excuse me. Not to take the time of the Court, I do not doubt that they are genuine photographs. I am going to object for an entirely different reason.

Mr. Fink: You are not going to require the production of the photographer? [144]

Mr. Jacobs: No.

Mr. Fink: Let's make the tender and get it over with. I now offer in evidence, if Your Honor please, and ask that they be marked in evidence, the series of photographs which now bear Exhibit No. 48 A through H, for identification.

Mr. Jacobs: The objection, Your Honor, is on the ground that these are not representative photographs of the news vendors supplied by the plaintiff publishers, and the only validity they can have is to indicate a representative condition. To produce a photograph like this, where it may be one out of 500 vendors having a stand like this, to put it before this Court in this record as a typical vendor is to distort the facts.

Mr. Fink: Each one happens to be, if Your Honor please, a separate corner.

The Court: Well, I think if Counsel doesn't mind, I want to ask a few questions of Mr. Parrish.

Q. About how many news vendors are there functioning under this arrangement with the newspapers of San Francisco?

A. That would be a difficult question.

Q. Well, approximately?

A. The number may go as high as 150, Your Honor.

(Testimony of William Parrish.)

Q. You mean it varies from time to time?

A. Yes, sir. I don't mean 150 people selling magazines.

Q. I am not asking you about that. I want to know how many [145] news vendors there are, on the average, selling newspapers in San Francisco who belong to the Union.

A. I would say today it would be in excess of 100.

Q. In excess of a hundred? A. Yes.

Q. Have you been around San Francisco and looked at these places where they sell, as demonstrated in the photographs, other than newspapers?

A. Magazine stands, racing forms.

Q. You say you have been around and seen them?

A. Certainly.

Q. With respect to the total number of persons who belong to the union who sell newspapers, how many maintain that type of stand, as presented in the photographs?

A. Which particular type, your Honor?

Q. Well, these stands. Look at the photographs.

A. You mean large magazine stands, your Honor?

Q. The kind represented in the photograph.

A. This, for instance, I would say approximately ten.

Q. You would say about one-tenth of the news vendors operating under this contract have stands where they sell other things besides the newspapers?

A. No, that is done as a rule, your Honor.

(Testimony of William Parrish.)

Q. That is what I am asking.

A. I say there are about ten news stands, your Honor, and then there are a great number of men who sell, say, the Racing Form.

Q. How many in proportion to the total number?

A. That would run around 15, and in 1937 the number was larger. [146] In 1937 you could get these forms, but you cannot get them now. It is difficult to get them. The number then would run around 50 or 60. Then there are a number of men who are selling the People's World.

Q. I am not talking of other newspapers.

A. Well, that is not a party to this contract. That is something. Only people who can handle that under the law of the union is those who make in excess of the guarantee.

Q. How many, in your opinion, are selling that?

A. The People's World?

Q. The People's World?

A. I would say, oh, 50.

Q. 15 or 50?

A. 50. Some of these people sell all of them. Some only sell one of them.

Q. That brings you down to a point where no news vendors in San Francisco are selling only newspapers.

A. Oh, no, your Honor.

Q. What is the proportion, approximately?

A. I would say in the year 1937-1938 there were 100, without a shadow of doubt, and more, who were selling other publications—we use the word "publications"—than that which they had a contract to sell.

(Testimony of William Parrish.)

Q. And how many were selling just newspapers?

A. Your Honor, if you use the word——

Q. I don't want you to argue with me about it.

A. I don't want to argue, your Honor. [147]

Q. How many were selling, to the best of your knowledge, nothing but newspapers?

A. If 100 were selling magazines, 650 must have been selling newspapers.

Q. Would it be fair to state that about one-sixth of the total number of news vendors were selling other things besides newspapers?

A. Under Section 20, yes.

Mr. Fink: I have an offer in evidence of these photographs, your Honor.

The Court: I did not want to interfere, Mr. Fink, but it seems to me this matter cannot be very controversial.

Mr. Fink: If your Honor please, I cannot see where there can be a controversy on it to save my neck, but apparently Counsel for the defendant does.

The Court: Now, if the witness' statement is not accurate, Counsel can cross-examine or put on other testimony.

Mr. Fink: Certainly. I understand these are admitted in evidence?

The Court: Is there an objection?

Mr. Jacobs: There is an objection, your Honor.

The Court: The objection is that they are not typical. Is that your point?

Mr. Jacobs: Yes.

(Testimony of William Parrish.)

The Court: I think that goes to the weight of the testimony. I will allow them to be admitted.

(The photographs heretofore marked Exhibit 48 A to H [148] for identification, were received in evidence and marked Plaintiff's Exhibit 48, A, B, C, D, E, F, G and H.)

Q. (By Mr. Fink): Now, just to clean that matter up entirely, Mr. Parrish, are there vendors, to your knowledge, in San Francisco that sell articles other than publications, no matter what the publications are?

Mr. Jacobs: May the record show the same objection, your Honor.

The Court: Will you read that, please?

(Question read by the Reporter.)

The Court: Hasn't he already answered that?

Mr. Fink: No, your Honor. We have been dividing them, and my questions and the Court's questions were all devoted to publications. This question is whether he knows of his own knowledge whether the vendors sell something else, articles other than publications.

The Court: Oh, all right. You mean candy bars, something like that?

Mr. Fink: Yes, your Honor, candy bars, razor blades, various things that will be shown here.

The Court: Very well. I will overrule the objection.

(Testimony of William Parrish.)

The Witness: A. Your Honor, I cannot answer that today, but a few years back, at the City Hall, perhaps your Honor remembers——

The Court: Just answer Yes or No, and we will get along. [149] A. Yes, say 38 to 37.

Q. (By Mr. Fink): Mr. Parrish, does your membership have a proportion of disabled members?

A. Yes.

Q. When I say “disabled” members, are they handicapped in various ways? A. Yes.

Q. But each one——

A. By loss of limbs, loss of eyesight, loss of hearing and other ailments too numerous to mention.

Q. Are there some of them, do you have members who are mentally deficient? A. Yes.

Q. Now, did you ever take occasion to reduce that to a matter of proportion? Do you know what is the approximate percentage?

A. I presented to the Bureau of Internal Revenue a proportionate recap on it.

Q. Do you remember any of those figures?

A. No, but I have it in my briefcase, and I am certain that Counsel for the Government has the figures.

Q. And after the recess you can have that figure, can you? A. Yes.

Q. Now, these handicapped members, no matter what handicap they may have, receive the same type of contract under the Master Contract that the other vendors receive? A. Yes.

(Testimony of William Parrish.)

The Court: I think this might be an appropriate time to take the recess now.

(Recess.) [150]

Q. (By Mr. Fink): Mr. Parrish, do you submit any written reports to the publishers as a vendor? A. No.

Q. Do you report to the premises of the publisher? A. I don't.

Q. Are you required to attend any sales meetings, conferences, consultations? A. No.

Q. Are any instructions given to you by the publishers?

Mr. Jacobs: I object to what constitutes instructions as a conclusion. Whether given by the publisher, that is a very vague term. The more important objection is what constitutes instructions. That calls for a conclusion on the part of this witness.

The Court: It does call for the conclusion of the witness, I think. If the instructions were in writing, that would be the best evidence, that would be the orthodox type of objection, I suppose.

Mr. Fink: I withdraw it.

Q. Are any written instructions given you by any publisher? A. No.

Q. Are any verbal instructions given you by any publisher? A. No.

Q. Are any of your expenses borne by the publishers, whatever your expenses may be?

A. No, with the exception of one thing.

(Testimony of William Parrish.)

Q. What is that?

A. Under the agreement, in case of [151] arbitration, they are liable for 50 per cent.

Q. Ordinarily nothing of that kind?

A. No.

Q. Are you allowed a drawing account or given any advance, let's add then, by the publisher?

A. I am afraid not.

Q. Are you furnished with transportation?

A. No.

Mr. Jacobs: You understand, Mr. Parrish, this is directed to you individually, not the Union. Is that your understanding?

Mr. Fink: Now, if your Honor please, Counsel will have an opportunity to cross-examine fully.

Mr. Jacobs: I object, unless you state what the question means. Is this man furnished any transportation, is one thing; and whether the Union is, is another.

The Court: He did not ask that, Mr. Jacobs. All he asked was whether he was furnished with transportation.

Q. (By Mr. Fink): Mr. Parrish, the matter of these advertising placards that you see at various corners, are they supplied by the publisher?

A. Yes.

Q. Are you required to put them out?

A. No. I never, my own self, put a rack card up since the first agreement.

(Testimony of William Parrish.)

Mr. Jacobs: I am sorry, I did not hear.

The Court: Read it.

(Answer read by the Reporter.)

Mr. Fink: I think you may cross-examine. [152]

Cross-Examination

By Mr. Jacobs:

Q. Mr. Parrish, have you got a copy of the original constitution and by-laws with you?

A. Yes. Pardon me, your Honor.

The Court: It is all right.

A. Your Honor, we will be able to get this stuff back, will we not?

The Court: Have you any copies?

A. I was just asked for that. One of the members had it, more or less as a keepsake.

Q. Can you substitute a copy of the document he is asking for?

A. That is the only copy I know of. I mean, after the trial is over.

The Court: Oh, yes.

Mr. Jacobs: I would put in a copy now if I had one, your Honor.

The Witness: That is 1937, that is the first one.

Mr. Jacobs: I ask that that be marked for identification, please.

The Witness: Do you want these other three now?

Mr. Jacobs: Let me see them. These are the same?

(Testimony of William Parrish.)

A. No, this is a revision of that one; this one is a revision, and then this one is the last one, and there is the amendments.

(The Constitution was marked Defendant's Exhibit B for identification.) [153]

Mr. Jacobs: May I have it, please.

Q. I show you Defendant's Exhibit B for identification and ask you if you recognize it.

A. It is the constitution that was adopted in 1937 by the Union.

Q. Is this the original constitution?

A. Yes, it is the original.

Q. Does it contain the by-laws, too?

A. It contains the constitution and by-laws.

Mr. Jacobs: The Government offers Defendant's Exhibit B in evidence.

Mr. Fink: No objection.

The Court: Very well, it will be admitted.

(The Document referred to and heretofore marked for identification was received in evidence as Defendant's Exhibit B.)

Q. (By Mr. Jacobs): Mr. Parrish, I note from Defendant's Exhibit B, the original constitution and by-laws, that you are affiliated with the American Federation of Labor. When were you so affiliated?

A. I cannot give you the exact date of the receipt of the charter, but on or about June 1st Mr. Shelley, the President of the Central Labor Council, said he would recommend that we be issued a

(Testimony of William Parrish.)

charter, and it was a certainty that we would be given it.

Q. You were issued a charter by the American Federation of [154] Labor? A. Yes.

Q. Mr. Parrish, is it a fair statement to say that the American Federation of Labor is an organization composed of labor unions?

Mr. Fink: Just a minute, if your Honor please. I object to that as immaterial, incompetent and irrelevant. What has it got to do here?

Mr. Jacobs: May it please the Court, it is Mr. Fink's contention——

The Court: I will overrule the objection.

The Witness: Will you restate the question, please.

Q. (By Mr. Jacobs): Is it a fair statement, Mr. Parrish, to say that the American Federation of Labor is an organization composed of labor unions? A. To the best of my knowledge.

Mr. Jacobs: Mark that for identification, please.

(The document was marked Defendant's Exhibit C for identification.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit C for identification, and ask you if you recognize it?

A. Yes, it is the constitution and by-laws which was adopted by the Union, I believe, in 1938.

Q. Does the notation at the end there refresh your recollection, September 17, 1939?

A. Is that when it was? Was it that late? [155]

(Testimony of William Parrish.)

Q. Yes. A. Well, that is correct, then.

Mr. Jacobs: I offer this in evidence as Defendant's Exhibit C.

The Court: It may be admitted.

(The document referred to and heretofore marked for identification was received in evidence as Defendant's Exhibit C.)

Mr. Jacobs: Will you mark this for identification?

(The document referred to was marked Defendant's Exhibit D for identification.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit D for identification, and ask you if you recognize it.

A. It is a copy of the constitution and by-laws of the International Printing Pressmen and Assistants Union of North America.

Mr. Jacobs: The Government offers Defendant's Exhibit D for identification in evidence.

Mr. Fink: I object to the introduction in evidence of that document as being incompetent, immaterial and irrelevant, with nothing to show that it throws any light on the problem we are here to solve.

The Court: What is the document?

Mr. Jacobs: May I ask a preliminary question, if it please the Court?

The Court: All right. [156]

Q. (By Mr. Jacobs): What connection, if any, has the News Vendors Union, of which you are

(Testimony of William Parrish.)

the secretary and treasurer, with the International Printing Pressmen and Assistants Union of North America? A. We are affiliated.

Q. What do you mean by "affiliated"?

A. We support the Union of the International.

Q. When were you affiliated?

A. 1939, or the first month in 1940, right around that time.

Mr. Jacobs: The Government renews the offer.

Mr. Fink: I renew the objection.

The Court: That is a big book, there.

Mr. Jacobs: I will tell you why I am introducing it, your Honor, for two reasons: In the first place, the constitution and by-laws of this Union adopt and incorporate by reference the constitution and by-laws of the parent Union.

Q. Is that correct?

Mr. Fink: Well, the document speaks for itself.

The Court: If you say that is in there, I think it would admissible.

(The document referred to and heretofore marked for identification was received in evidence and marked Defendant's Exhibit D.)

Mr. Jacobs: May I see Defendant's Exhibit C, please? Will the Court excuse me just one moment? May this be marked for [157] identification.

(The document referred to was marked Defendant's Exhibit E for identification.)

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit E for identification, Mr. Parrish, and ask you if you recognize it?

A. It is a copy of the constitution and by-laws and general laws of Local No. 468.

Q. Is this constitution and by-laws in force today? A. They are.

Mr. Fink: That is admitted.

Mr. Jacobs: The defendant offers in evidence Defendant's Exhibit E for identification.

The Court: Is that the same as you offered before?

Mr. Jacobs: No, this one is brought up to date, in present existence.

The Court: Very well, admitted.

(The document referred to and heretofore marked Defendant's Exhibit E for identification was received in evidence.)

Q. (By Mr. Jacobs): Mr. Parrish, turning your attention now to your testimony of yesterday, with particular reference to negotiations between the Union and the Publishers, if I recall correctly you stated you were a member of the negotiating committee of the original contract, were you not?

A. Yes.

Q. Now, will you state what the procedure of the negotiating [158] committee was in preparing and submitting proposals?

A. I don't quite get the gist of your question, Mr. Jacobs.

(Testimony of William Parrish.)

Q. Put it this way—strike that question.

You were appointed by the membership?

A. Elected by the membership.

Q. And authorized to negotiate a contract with the publishers. Is that correct?

A. That is correct.

Q. And you were a member of that committee?

A. That is correct.

Q. Now, how did the committee proceed?

A. We first met on the advice of Mr. Shelley, who was president of the Central Labor Council, with Mr. Sam Kagel, who at that time was the Chief Assistant, I believe, to Mr. Henry B. Melnikow of the Pacific Coast Labor Bureau, and discussed what we wanted in the way of conditions from the publishers.

Q. What?

Mr. Fink: Wait a minute.

Mr. Jacobs: Are you through?

A. No. After all, that was quite some time, Mr. Jacobs. That was immediately following an early morning meeting. At that time we were informed by Mr. Kagel——

Q. You don't understand the question. All I want to know is the procedure, Mr. Parrish. Did the committee——

Mr. Fink: Just a minute.

Mr. Jacobs: I am asking a question. [159]

Mr. Fink: If your Honor please, Counsel asked this witness a question and it was a broad question, and the witness is giving an answer, I submit.

(Testimony of William Parrish.)

The Court: I think that may be true, but I don't think it was intended by the question that the witness was to be asked for conversations, or what they discussed. Can't you narrow your question? It is broad.

Mr. Jacobs: I will, your Honor.

Q. Who drew the first written proposal submitted to the publishers?

Mr. Fink: Objected to as incompetent, irrelevant and immaterial. It is in evidence. What difference does it make who drew it up?

Mr. Jacobs: Nobody paid more attention to negotiations and all the steps.

The Court: I will overrule the objection.

A. The contract was drawn up by a committee of eight men who represented the Union, with the aid of the Pacific Coast Labor Bureau.

Q. (By Mr. Jacobs): After that thing was drawn up was it passed upon by a vote of the committee? A. By a vote of the committee?

Q. Yes, the negotiating committee.

A. Yes, nothing could go in there unless by unanimous consent.

Q. And the first written proposal was passed unanimously by [160] the committee. Is that correct? A. That is correct.

Q. And before submitting it to the publishers it was submitted to the membership of the Union?

A. Yes.

Q. And was passed by the membership of the Union, was it not?

A. Yes, yes, that is correct.

(Testimony of William Parrish.)

Q. Was that same procedure followed with respect to the negotiations of the 1939 contract?

A. That is correct.

Q. And the same procedure with respect to the written proposal submitted to the publishers under that contract?

A. Will you restate that question, please.

The Court: Read it.

(Question read by the Reporter.)

A. Yes.

Q. (By Mr. Jacobs): Now, on August 31st, 1937, approximately how many members did the Union have in good standing?

A. That is a difficult question for me to answer. I was not secretary.

Q. The figure you gave to the Judge on direct examination was about 600.

A. Well, the figure I gave to the Judge was approximately 750.

Q. Is that a fair estimate?

A. Yes, whether they were all in good standing with the Union or not, I have no means of knowing.

Q. At least you had approximately 750 Union members, whether they were in good standing or not.[161]

A. It was between seven and 800.

Q. Today, Mr. Parrish, do you have approximately 200 of the original members still in the Union?

A. I believe that figure is 221, and since that time three or four have passed away.

(Testimony of William Parrish.)

Q. Many of them have died meantime, haven't they? A. Oh, yes.

Q. Mr. Parrish, did you submit to the Bureau of Internal Revenue a statement showing the relative age and the number of men in each age bracket on or about January 16, 1945? A. Yes.

Q. Have you got that? Correct me if I am wrong, Mr. Parrish. Of the membership on or about March 16, 1945, ten of the members were between 18 and 30 years; 33 were between the ages of 30 to 41; 83 between the ages of 41 to 50; 161 between the ages of 51 and 64, and 71 between the ages of 65 and 80.

A. If those are the figures that are here, that is correct.

Q. Will you examine it and see if that is correct.

A. That is correct.

Q. Mr. Parrish, the final contract entered into between the publishers and the Union on August 31, 1937, was submitted to the membership, was it not? A. Yes.

Q. And passed? A. Yes.

Q. Do you know whether all the membership was there at that meeting?

A. It was a big meeting.

Q. You don't know whether they were all there, or not. A. There is no way of knowing.

Q. I understand, Mr. Parrish, that you have approximately ten men suffering from mental disabilities. Is that correct? A. How many?

(Testimony of William Parrish.)

Q. Ten.

A. If it says that there, that is correct.

Q. Is that your recollection?

A. Yes. There might possibly be more.

Q. Were those members present at those meetings when the first contract was passed upon?

A. That would be something I could not answer.

Q. They could have been there and you would not know it.

A. There is no reason why they could not.

Q. And they could have voted and you would not know it.

A. And could have not voted, either.

Mr. Fink: Let's mark that document for identification. If you don't do it, I will ask to do it.

Mr. Jacobs: I am not going to do it.

Mr. Fink: I certainly am, then.

The Court: Very well, let it be marked.

Mr. Fink: I would ask that it be marked for identification.

(The document referred to was marked Plaintiff's Exhibit No. 49 for identification.)

Q. (By Mr. Jacobs): Mr. Parrish, do you know Mr. Charles H. Bowers? A. I do.

Q. Is he a member of the union. A. He is.

Q. The News Vendors Union? A. He is.

Q. A member now? A. A member now.

Q. Has he occupied any office in the Union?

A. He has.

(Testimony of William Parrish.)

Q. Tell what offices and what periods he occupied those offices.

A. He was secretary-treasurer of the Union from the year 1937 until 1943, October, if I recall correctly. He became secretary in the month of October. Make that September. He became secretary in September and ceased to be secretary in October of 1943.

Q. 1943? A. 1943.

Q. You have the minutes of the Union in your possession? A. Yes, I have.

Q. Mr. Parrish, does the record of the Union show, indicate that Mr. Bowers made a trip to Sacramento, California, on or about May 6, 1941?

Mr. Fink: Just a minute. I object to that as not proper cross-examination.

The Court: What are you getting at now?

Mr. Jacobs: I will tell you what I am getting at. I am establishing a foundation for the introduction of a document prepared by the Secretary and Treasurer of this Union, which is inconsistent with the position he takes.

The Court: Well, just ask for the document. Why do you have to go through all that? [164]

Mr. Jacobs: The document was submitted to an agency of the State of California. I will have them identify the document. From this witness I will establish the position and action taken by Mr. Bowers.

Mr. Fink: That simply indicates that my objection is good. That is part of his case. There was no

(Testimony of William Parrish.)

direct examination on that. Let him call Mr. Bowers, or prove the case by his own witness.

Mr. Jacobs: On the contrary, if your Honor please, obviously the position of the plaintiffs, of course, and this witness, is that these people are independent contractors. Mr. Parrish makes no effort to conceal that position; he indicates that is his view as an individual, and also indicates it is his view as an officer of the Union. I want to show by his predecessor in office that a different and opposite position was taken. The only way I can do it is to have this witness testify to the official position of the witness. I would like to do that and then introduce those documents.

The Court: Well, the objection is overruled, if that is the purpose of it.

The Witness: The minutes of May of 1941 show——

Q. (By Mr. Jacobs): May I see the minutes, please.

The Court: Stand back a little, Mr. Jacobs. The closer you get to the witness the more opportunity there is for antagonism. In fact, some of my colleagues won't let attorneys go anywhere near the witness. There is the paper. [165]

The Witness: You will find it at the bottom of the page.

Mr. Jacobs: Will you mark this for identification, please.

(The document referred to was marked Defendant's Exhibit F for identification.)

(Testimony of William Parrish.)

Mr. Jacobs: I show you Defendant's Exhibit F for identification, Mr. Bowers——

A. I beg pardon.

Q. I show you Mr. Parrish, I am sorry, Defendant's Exhibit F for identification, and ask you if these are the official minutes of the News Vendors Union? A. Yes.

Mr. Fink: Of what date?

A. May 11th, I believe it was.

Mr. Jacobs: The meeting called to order on Sunday, May 11th, 1941, at 1:00 p.m. by President McNamee, I read from the minutes:

“Meeting called to order Sunday, May 11th, 1941 at 1:00 p.m. by President McNamee.”

I am reading an excerpt from the minutes, unless there is some objection by Counsel:

“The law and legislative committee referred to Brother Bowers as follows. A hearing was held in Sacramento on the bill to change the status of news vendors from that of small merchants to that of employees, so as to get the benefits of Social Security laws. After hearing Brother Bowers the [166] Legislature Commission decided to request briefs from both sides. The report approved and accepted.”

The Witness: That is not what that reads. It does not say “Legislation Commission.”

Mr. Jacobs: The word I read is stated here to be “Com.” I will amend that statement, not stating “Committee” or “Commission” to read “Legisla-

(Testimony of William Parrish.)

ture Com." A. That is all right.

Q. Mr. Parrish, was the News Vendors Union during the years 1937 to 1940 affiliated with any other organization other than the American Federation of Labor and the International Printing & Pressmen's Union and the San Francisco Labor Council?

A. Well, we were affiliated with the Labor Non-Partisan League; we had affiliations with the Allied Printing Trades Council; we had affiliations with the Union Labor Section of the San Francisco Labor Council; we were affiliated with, I guess that is about all the affiliations that I can recall.

Q. Now, Mr. Parrish, you stated on direct examination that members of the News Vendors Union from time to time sold publications other than newspapers. Is that correct?

A. That is correct.

Q. Has the News Vendors Union entered into collective bargaining agreements with any of the publishers producing such other publications?

A. Yes, we entered into a bargaining agreement.

Q. May I see it?

Mr. Fink: Just a minute. You asked a question.

Mr. Jacobs: I want to see the best evidence. I am conducting my examination, with the permission of the Court.

Mr. Fink: I submit that Counsel is not entitled to break into the witness' answer.

The Court: He answered, Mr. Fink. He said yes, they did. Counsel asked for the document.

(Testimony of William Parrish.)

Mr. Fink: He wanted to make an explanation.

Mr. Jacobs: He can make an explanation on redirect.

The Court: I suppose the best explanation would be to produce it. Go ahead, Counsel.

Q. (By Mr. Jacobs): Have you a copy of that agreement?

A. I have a copy of the agreement with the World Publishing, I think that is the name of the thing.

Q. May I see it, please?

A. As soon as I can find it.

The Court: Are there any other documents you are going to request the witness to produce?

Mr. Jacobs: Yes, I am.

The Court: Why don't you give him a list of them?

Mr. Jacobs: Those have been subpoenaed, your Honor.

The Court: Suppose we take the noon recess, and see if you can get this document and the other documents in order, so he can produce them.

The Witness: That is fine with me, your Honor. I had [168] them all in order.

The Court: Suppose you take them out of your files, and have them handy.

The Witness: Certainly.

The Court: We will recess the trial until 2:00 p.m.

(An adjournment taken until 2:00 o'clock p.m. this date.)

WILLIAM PARRISH

called as a witness on behalf of the Plaintiffs, resumed the witness stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Jacobs:

Q. You will recall, Mr. Parrish, before the recess you were searching for a contract between the union and the World Publishing Company.

(Witness handed a document to counsel.)

Mr. Jacobs: May this be marked for identification, please.

The Clerk: Marked Defendant's G for identification.

(Thereupon the document referred to was marked Defendant's Exhibit G for identification.)

Mr. Jacobs: I hand you Defendant's Exhibit G for Identification, and ask you if you recognize it?

A. This is the contract that was signed by the union.

Q. And the publishers, the World Publishing Company, is that correct? A. Yes.

Q. What publications are produced by the World Publishing Company?

A. The Communist paper.

Q. What is the name of it?

A. The People's World.

(Testimony of William Parrish.)

Q. Is the People's World sold by members of your union?

Mr. Fink: Just a moment. May it please the Court, that [170] is objected to as incompetent, irrelevant and immaterial, and shedding no light on the issues of this case, because what is the contract or what the intention may or may not be with some third party cannot have anything to do with this case.

Mr. Jacobs: Are you through, Mr. Fink?

Mr. Fink: Yes.

Mr. Jacobs: There are at least two reasons why this contract and the question are relevant.

In the first place, Mr. Fink injected into the issue the fact that these news vendors sold other publications, and I am entitled to show the circumstances under which they sold those other publications if that issue is material and the plaintiffs are allowed to introduce that in evidence.

And secondly, and equally important, is the fact that plaintiffs contend here is a group of independent contractors. By the terms of this contract, which I will show to the Court and read from to the Court, it indicates that these vendors are employees.

The Court: Of the publishers?

Mr. Jacobs: Yes, your Honor.

Mr. Fink: Not of these plaintiffs, if your Honor please of some third party.

The Court: That is what prompted my question. Do you mean this contract indicates that the mem-

(Testimony of William Parrish.)

bers of the union [171] are employees of the World Publishing Company, or that they are employees of the publishers involved in this case?

Mr. Jacobs: Employees of the World Publishing Company, selling that publication at the same time and at the same place and under the circumstances the same as the newspapers here involved.

Mr. Fink: So what?

The Court: I think the mere fact that the news vendors were employees of somebody else, or some other publisher, would not prove what the nature of their relationship was with the plaintiffs in this case.

Mr. Jacobs: Well, I don't want to quarrel with your Honor's ruling; I can't quarrel with your Honor's ruling.

The Court: You may mark it for identification. I think the objection is good. There is no issue before me as to what the relationship of the news vendors was to this other publication.

Mr. Jacobs: Does you Honor understand my position?

The Court: I understand it.

Mr. Jacobs: I mean, with respect to the question of this union representing themselves as employees.

The Court: By the same token they might be engaged in an independent contract relationship with some third party which would in like manner not redound to the benefit of the plaintiffs' contention in this case. It is what governs the [172] relationship of the plaintiffs to the news vendors that

(Testimony of William Parrish.)

counts, and not the relationship they might have with somebody else, be it alike or unlike the relationship, the nature of which is at issue here. You may mark it for identification. I will sustain the objection.

Mr. Jacobs: What was the last question? I will state the offer of proof.

(The reporter read the last question.)

Mr. Jacobs: The Government offers to prove that the People's World is sold by the vendors of the union here in question at the same time, at the same place and under the same circumstances as the newspapers published by these plaintiffs and are among the publications mentioned by this witness on direct examination.

The Court: You already have in evidence much of what you have stated in your offer of proof. The witness has already stated that the news vendors do sell this publication.

Mr. Jacobs: That may be, your Honor.

The Court: You have made your position clear in the record.

Mr. Jacobs: Yes.

Mr. Fink: If your Honor please, while there is an interruption, I have in mind that this morning I made two offers of proof, and just to perfect the record, may the record show that the Court denied leave to pursue that line of examination [173] on the offers?

The Court: Very well.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): Mr. Parrish, has the union of which you are Secretary and Treasurer entered into collective bargaining agreements with the California Sports Service, Inc.? A. Yes.

Q. Have you a copy of that contract?

A. There is no copy of the first agreement available, Mr. Jacobs, but I have a copy, one of the 1942 agreement, which is, I would say, essentially, for the purpose of comparison, is the same as the first agreement. As a matter of fact, I don't know when the first agreement was signed by these people.

Q. Is the document which you hand me the contract of which you speak?

A. That is right, California Sports Service.

Mr. Jacobs: Mark this for identification, please.

The Clerk: Defendant's Exhibit H for Identification.

Mr. Jacobs: The Government makes the same offer to introduce in evidence Defendant's Exhibit H and makes the same offer of proof.

Mr. Fink: To which we object upon the ground that it is incompetent, immaterial and irrelevant, it sheds no light upon the issue here before the Court.

Mr. Jacobs: Your Honor has already ruled on it.

The Court: Yes.

Mr. Fink: I just wanted the formal objection. It is as to us pure hearsay.

The Court: The Court will make the same ruling with respect to this contract. That is on the theory that it is being offered for the same purpose as the other was.

(Testimony of William Parrish.)

Mr. Jacobs: Yes, your Honor.

The Court: Very well.

Q. (By Mr. Jacobs): Mr. Parrish, has the union, of which you are Secretary and Treasurer, entered into a contract with the Al Greenstone Distributing Company? A. Yes, we did.

Q. Have you a copy of that contract?

A. I have.

The Court: Before you proceed with that, does the contract which you have just had marked for identification refer to newspapers and periodicals, or some other commodities?

Mr. Jacobs: I didn't want to burden the Court with that.

A. It involves hot dogs, peanuts and beer. That is, the vendors at the ball park, your Honor.

Mr. Fink: That has a lot to do with this case.

The Witness: One of them, or two of them, rather, sell programs. The others——

Mr. Jacobs: To make the record clear, Mr. Parrish, I am referring to publications sold under Defendant's Exhibit H for Identification and published by California Sports Service [175] Incorporated. What publications are produced and sold by the union vendors under this contract?

A. The only thing that could be, would be the program.

Q. Is that all there is?

A. Yes, programs and score cards.

Mr. Jacobs: Mark this for identification, please.

The Clerk: Defendant's Exhibit I for Identification.

(Testimony of William Parrish.)

Mr. Jacobs: I show you Defendant's Exhibit I for Identification and ask you if you recognize it?

A. Yes, it is the contract with Al Greenstone.

Q. What publications are produced by Al Greenstone? A. They didn't produce any.

Q. Have any publications ever been sold by the union news vendors under this contract?

A. Under that contract, yes.

Q. What publications were they?

A. View books, guide books and postcards, and various items that are on sale over at Treasure Island and on the ferry boats operating to and from.

Mr. Jacobs: The Government offers in evidence Defendant's Exhibit I for Identification and makes the same offer of proof.

The Court: For the same purpose?

Mr. Jacobs: Yes.

The Court: You make the same objection? [177]

Mr. Fink: Same objection, your Honor, yes.

The Court: Same ruling.

The Witness: I would like to change my testimony in one respect, your Honor. The people engaged in selling programs—that was the only thing that was touched on—with the California Sports Service are a group that is set apart from the news vendors. The people who sold view books, guide books and so forth, on Treasure Island were also another group that were set apart. They held their own meetings and so forth. We negotiated for them by reason of the fact that the Labor Council requested us to do so.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): Are the vendors who sell those publications members of the union of which you are Secretary and Treasurer?

A. They were given membership, but on a limited basis; they couldn't go out and take a contract to sell papers.

Q. Mr. Parrish, is the statement you just made true with respect to the People's World?

A. No, I named the two contracts that I had reference to.

Q. Did the union, of which you are Secretary and Treasurer, enter into any other contracts for the sale of publications with any other publisher or organization?

A. The Oakland Ballpark, Mr. Greenstone only had that distributing concession for a period, I think, of about two months, and he folded up, and to be frank with you, I can't [177] remember the name of the company that was actually producing the stuff, but they took it over themselves and distributed themselves. They put a Mr. Woodward, or something like that, over there.

Q. Maybe you didn't understand my question, Mr. Parrish. Is there any other organization—organization other than the ones mentioned in Defendant's Exhibits G, H and I—with which the union entered into a contract for the sale of publications?

A. We have a contract with Iceland during the Ice Follies out there; they sell this big program, if you call that a publication.

(Testimony of William Parrish.)

Q. Is there any other organization?

A. I don't know whether Sam Miller handles any programs or not. If he does, we handle the programs for Sam Miller.

Q. Have you any contract with any organization which distributes magazines? A. No.

Mr. Jacobs: May this be marked for identification, please.

The Clerk: Defendant's Exhibit J for Identification.

Q. (By Mr. Jacobs): Mr. Parrish, I show you Defendant's Exhibit J for Identification, and ask you what it is?

A. It is a report of the 1937 negotiations committee which was given on July 25th, which, to the best of our ability, outlined the actions of the committee since the committee was first formed. [178]

Q. I observe on the top of it——

Mr. Fink: Pardon me. Do you mind letting me see what you are examining about?

The Court: I think you should show it to counsel.

(The document was handed to Mr. Fink.)

Q. (By Mr. Jacobs): Referring——

A. There is one error in that, Mr. Jacobs; it was delivered Sunday, October 1st.

Q. October the 1st?

A. Yes. I don't know how that date got on there, but it was delivered Sunday, October 1st, according to the minutes.

(Testimony of William Parrish.)

Q. Delivered to whom.

A. To the membership.

Q. And did they take a vote on it?

A. They did.

Q. And did they approve it? A. They did.

Mr. Jacobs: The Government offers in evidence Defendant's Exhibit J for Identification.

Mr. Fink: To which we object upon the ground that it is incompetent, immaterial and irrelevant, and that the negotiations on reports of committees of the union are not binding upon us; on the further ground that whatever the negotiations were, they were merged into the written contract which is now before you for interpretation.

Mr. Jacobs: If I might say so, it seems peculiar to hear that objection on those particular grounds from Mr. Fink, because the whole subject of the direct examination of plaintiffs [179] has been directed to show the negotiations. He has stated his contention that it was the intention of both parties to the contract to create the relationship of buyer and seller and not that of employer and employee, and this document, properly identified by this witness, contains a statement directly bearing on that, that I would like to read to this court.

The Court: Neither side went into the actual nature, the actual details of negotiations. It has been already brought out that there were negotiations on the various subjects that were covered in the contract; that the parties had different ideas, and that they finally came to an agreement. This

(Testimony of William Parrish.)

witness has already testified—if not this witness, the other witness who was on the witness stand—that at first the union wanted an employee contract, but that later they accepted the other form of contract. Now, what more can you show than that?

Mr. Jacobs: I am proposing to show by this statement, your Honor, that that was not the belief of the union. It is plaintiffs' contention, based on a statement in the contract and the testimony of their witness, that they accepted this as a condition and that it represents the genuine belief of the union of the relationship created, and this statement directly contradicts the statement of this witness, as well as Mr. Bitler. [180]

The Court: Maybe my memory is faulty, but I understood either this witness or the other witness, or both of them, to say that when the first negotiations took place that the union was asking for an employee contract, and that later when the publishers wanted this kind of a contract, that they finally acceded to it. That is already in the record. Am I incorrect about that?

Mr. Jacobs: That is right, your Honor.

Mr. Fink: You are correct.

The Court: That being so, what more do you need to show in that regard?

Mr. Jacobs: I think Mr. Fink will contend, certainly, that the belief of the parties—and he has so stated that the belief of the parties, that the intention of the parties, or the relationship is relevant—the belief of both parties. I believe he has asserted

(Testimony of William Parrish.)

that in one form or another. Now, that belief must be genuine, honest, frank belief of the relationship created.

The Court: The union may have had a belief to that effect at the time they first entered into the negotiations, but they didn't mutually enter into a contract to that effect.

I may have a dispute with you and have an honest belief that you owe me ten dollars, and then after we have negotiated a while I sign an agreement with you in which I accept five dollars. Now, our agreement is the agreement for \$5.00. [181] That is how disputes, if they are settled, how they finally end.

Mr. Jacobs: Let me carry your Honor's analogy applied to this case. But whether a debt actually existed may be determined by whether I thought I owed you it or because I just wanted to argue about it. This statement here tends to show that there was never any belief on the part of the union—never a belief that they were employees.

The Court: You mean at that time?

Mr. Jacobs: No, after the concession was made. After the concession was made. This is a statement made as to why they conceded the point, why they acquiesced in the demand.

The Court: You mean that the document that you have here indicates a construction of the contract that the union put on it after it was executed?

Mr. Jacobs: After this clause was agreed to by the union representatives in negotiation.

(Testimony of William Parrish.)

The Court: You mean that they then stated why they did it?

Mr. Jacobs: Yes. I think, if I read the statement, I am sure your Honor will——

The Court: Let me see the document, then I can pass on it. Indicate the part.

Mr. Jacobs: Read to this point (indicating).

The Court: I didn't so understand—— [182]

Mr. Fink: This is merely a report of a committee, if your Honor please, this isn't a union action; this is a report of a committee.

The Court: This report was rendered after the parties had come to an agreement.

The Witness: No, sir.

Mr. Jacobs: Did you say what date that was rendered?

The Court: He said October 1st.

The Witness: I said August 1st.

Mr. Fink: I think you inadvertently used "October."

The Witness: I what?

Mr. Fink: I was going to correct that.

The Witness: No, I said August 1st.

The Court: You said October. Is that correct?

A. I am sorry, sir. I didn't mean October then.

Mr. Jacobs: In any event, your Honor, you understand——

Mr. Fink: The contract is dated August 31, 1937, your Honor.

Mr. Jacobs: But it indicates after the concession was made in the negotiations.

(Testimony of William Parrish.)

The Court: I will allow it in evidence, that part that you have indicated.

Mr. Fink: If your Honor please, if any part of it is to go in, let us let the whole thing go in.

The Court: What is the offer, first? [183]

Mr. Jacobs: I offered the whole document.

Mr. Fink: To which I object upon the ground that it is incompetent, immaterial and irrelevant; that it sheds no light upon the problem before us; that the negotiations were merged into the contract of August 31, 1937, and that this is merely a report of a committee.

The Court: Well, I will allow the document to be admitted in evidence for the purpose stated by counsel of showing the intent of the labor union in making the contract.

Mr. Jacobs: That is correct, your Honor.

The Court: For that limited purpose.

(Thereupon the document referred to was marked Defendant's Exhibit J in evidence.)

Mr. Jacobs: I also call your Honor's attention to the use of the word "wages" in that statement.

Mr. Fink: If you Honor please, that document is going to do no good to either party unless it is read. There are several parts of it that are material, not only the part which was covered by counsel. If the counsel doesn't want to read it, I will do my own reading, if the Court please.

The Court: I will read the whole document. If you wish it to be read into the record——

(Testimony of William Parrish.)

Mr. Fink: I think the Court should read it or have it read for the record.

The Court: Let the whole contract be in evidence. [184]

Mr. Jacobs: It is in evidence.

Mr. Fink: It is not a contract; it is a report.

The Court: The entire report.

Mr. Fink: I point out to the Court, for the purpose of the record, that I was denied the right of going into this matter that counsel is now going into. Upon his objection, I was denied the very right counsel is now permitted to go into, and it will prolong our trial, your Honor. I am sorry, but if we are going into these matters that were so far behind the August 31st contract, I necessarily will have to cover them.

The Court: Well, of course, this arises on the cross-examination of the witness.

Mr. Fink: I understand, your Honor.

The Court: And I am not going to cut off cross-examination on a material matter any more than I would your cross-examination. You examined the witness, and if I recall correctly, in your direct examination you took up certain subject matters in the contract and asked him if there was a bona fide dispute about them, and if finally, as a result of going back and forth, they resolved the—they finally came to a contract as a result of resolving these conflicting points of view, and the witness said "Yes."

Now, in cross-examination counsel is entitled to bring out the motive and intent that was behind the final resolution [185] of any of these matters.

(Testimony of William Parrish.)

Mr. Fink: I attempted, your Honor, to go into the motive and intent and the detail of the negotiations, and the Court wouldn't permit it.

Mr. Jacobs: Shall I proceed?

The Court: Go ahead.

Q. (By Mr. Jacobs): Mr. Parrish, on how many occasions has the News Vendors Union voted to strike, or voted to call a strike, against either the San Francisco Examiner, the Chronicle, or the Call-Bulletin?

Mr. Fink: I submit that it is immaterial, if your Honor please, and object to it upon that ground.

The Court: I think it should be confined to the period in question.

Mr. Jacobs: To the years 1937 to 1940.

The Court: For that purpose, I will allow it.

A. '37 to '40? A strike vote was taken on the date of August 1st when this communication was delivered to the union, which resulted in a vote of 325 yes and 81 noes, 3 not voting.

The Court: That date, please?

A. August 1st.

Q. What year? A. 1937, sir.

Q. (By Mr. Jacobs): That is a vote to strike?

A. Yes.

Q. Proceed. Is that the only one?

A. On April the 14th, 1940, a strike vote was taken. Then, [186] in the 1939 negotiations there was a strike vote taken. It is in the minutes, your Honor; I wasn't able to find it, but I know that it is there. I know that we took the strike vote.

(Testimony of William Parrish.)

The Court: When you say "strike vote," what do you mean by that?

A. Well——

Q. (By Mr. Jacobs): Did your membership favor a strike?

A. The manner in which you do it, you empower—the union empowers the negotiating committee to call a strike if settlement can't be obtained.

The Court: Was that done on the occasions that you have mentioned?

A. Yes, sir. Then, your Honor, you have to go to the Labor Council, and at that time we had to go to the American Federation of Labor, for sanction.

Q. (By Mr. Jacobs): Now, turning for a moment, Mr. Parrish, to your own history as a news vendor, have you ever followed any other trade or occupation besides news vending? A. Yes.

Q. What other trades or occupations have you had? A. Construction worker.

Q. Have you been a member of any other union?

A. Laborer's Union.

Q. When you were a member of the Laborer's Union, were you an employee of the person you were working for?

Mr. Fink: Just a minute. Objected to as incompetent, irrelevant and immaterial, your Honor.

Mr. Jacobs: I will withdraw the question.

The Court: I will sustain the objection.

Q. (By Mr. Jacobs): Had you sold any newspapers prior to the time you sold newspapers in San Francisco? A. Yes.

(Testimony of William Parrish.)

Q. Where and for what periods?

A. A very short period of time in Chicago, I think for a period not exceeding two weeks; and Portland, Oregon, for a short period of time; and Los Angeles, California, for a short period of time.

Q. When did you first begin to sell newspapers in San Francisco?

A. To the best of my recollection, it was around the latter part of 1930.

Q. What paper did you sell at that time?

A. The Examiner.

Q. Will you state the circumstances under which you came to sell papers for the Examiner?

Mr. Fink: Objected to as incompetent, irrelevant and immaterial, and too remote.

The Court: This is before the period in question?

Mr. Fink: 1930; yes, your Honor.

Mr. Jacobs: I am only trying to trace the history of this witness up to and including the time in question. Moreover, the testimony of the plaintiffs is that the condition before was the same as the condition afterward with respect to the relationship of the parties. We don't think it was. They haven't showed it by this witness. [188]

The Court: Well, I don't recall any testimony to that effect. Was there?

Mr. Jacobs: I thought that was the whole tenor of Mr. Bitler's testimony.

The Court: What difference does it make what relationship they had beforehand? I don't see that

(Testimony of William Parrish.)

that is going to help me to decide the matter. What I have to decide is what is the relationship at the time in question.

Q. (By Mr. Jacobs): On April 1, 1937—I may point out that is just at the beginning of the taxable period—what newspaper were you selling?

A. The Chronicle.

Q. Now, under what circumstances did you come to sell the Chronicle?

Mr. Fink: On what date?

Mr. Jacobs: In——

The Court: He said April 1, 1937.

A. Well, I had been selling at the corner of Powell and Market since the latter part of '34 or the first part of '35, if I recall correctly.

Q. (By Mr. Jacobs): You understand, the question is the circumstances under which you were originally engaged to sell the Chronicle when you were selling them on April 1, 1937.

Mr. Fink: If your Honor please, I submit that question is vague and ambiguous, and object to it on that ground. What is meant by “circumstances.”

Mr. Jacobs: I was trying to avoid words which counsel might object to.

Q. Who hired you to sell the Chronicle?

Mr. Fink: Objected to upon the ground that there is no proper foundation laid; there is no showing that anybody hired him.

Mr. Jacobs: That is exactly the point I was getting at. I will repeat the question:

(Testimony of William Parrish.)

Q. Under what circumstances did you come to sell the Chronicle on April 1, 1937?

A. I walked down to the Chronicle and asked the street man if there were any open corners.

Q. Yes.

A. He says, "Not right now, but the man that has Powell and Market is leaving in about a week. If you want Powell and Market, you can have it."

Q. Continue.

A. So, about a week after that I started selling papers at the corner of Powell and Market.

Q. That is the corner you were selling on April 1, 1937? A. That is right.

Q. Now, at that time, on April 1, 1937, will you state generally what supervision and control was exercised by the wholesalers over the street vendors in your position?

Mr. Fink: Objected to upon the ground that the interrogation is obviously for a period prior to the contract, and upon the ground that it calls for an opinion and conclusion [190] of this witness.

Mr. Jacobs: The same opinion and conclusion that was requested of this witness on direct examination. The date, April 1, 1937, is within the taxable period under the plaintiff's own position.

Mr. Fink: I don't care whether it is within the taxable period or not. This contract is what we are seeking to interpret.

Mr. Jacobs: May it please the Court, there is a period of five months within the taxable period

(Testimony of William Parrish.)

when there was no contract in force, and that covers the taxes here in question.

Mr. Fink: I add to my objection the further objection that it is not proper cross-examination, part of the defendant's affirmative case.

The Court: Well, is the plaintiff seeking to recover any taxes for any period prior to the date of the contract?

Mr. Jacobs: The plaintiff, as I understand it from the complaint, may it please the Court, states that the Commissioner of Internal Revenue assessed and collected taxes for the period from April 1, 1937, through the calendar year 1940. If I misstated the complaint, I would like to know it.

The Court: What are you trying to show? That in the period between April and August, 1937, that the plaintiff isn't under any circumstances entitled to recover taxes, because in that period there was unquestionably some sort of an [191] employee relationship?

Mr. Jacobs: That is one of the reasons, your Honor; that is only one of the reasons.

The Court: Isn't that material, Mr. Fink, if in fact you are asking for recovery of taxes for that period?

Mr. Fink: Your Honor, I have——

The Court: I don't know whether you are asking for the recovery of taxes for that period; I haven't examined the complaint thoroughly.

Mr. Fink: I think that the first assessment, may it please the Court, was for a period of April 1,

(Testimony of William Parrish.)

1937, to October, 1937. My objection runs to really another point. I take it that the defendant would have an opportunity to put in an affirmative case for the period April 1 to August 31, but I don't believe it is proper cross-examination. I believe it is incompetent, irrelevant and immaterial at this time.

Mr. Jacobs: May it please the Court, I think it is proper cross-examination, because this man is called as a witness to show that he was an employee throughout the taxable period.

Mr. Fink: That he was an employee throughout the taxable period?

Mr. Jacobs: That he was not an employee.

The Court: The objection that it is not proper cross-examination, [192] I think, is too narrow. I will allow the question.

Mr. Jacobs: Will you read the question, Mr. Reporter?

(The reporter read the question.)

A. I would state as to things that relate to myself personally, but I can't speak for anyone else up until the period of time that we had an organization. And I think I am proper in saying that, your Honor, because——

The Court: That is all right; don't give us a talk on that now. Just, can you tell us the circumstances under which you sold the papers?

A. Yes, sir.

(Testimony of William Parrish.)

Q. All right. What were they?

A. I received the first edition at the corner of Fifth and Market night after night. I believe the press release time was around six o'clock, somewhere in that neighborhood. I began selling at the corner, walked across the street and started selling papers. About seven o'clock, or seven-thirty, the wholesaler, who was Johnny Rapolo, I think was his name, come around and give me more papers, and I would see him during the course of the night seven or eight different times, he would give me later editions, pick up the earlier ones.

At that time the Chronicle didn't leave early editions on the street; whenever they came by they picked up all of the early papers and left the later ones. Generally, Johnny would show up about——

The Court: I don't think that we are interested in that.

Mr. Jacobs: I am not, either.

The Court: I think what you are trying to get at is, you sold the papers and collected the proceeds from the public, to whom you sold them. What were your arrangements with the wholesalers as to your payment for the newspapers? How was the matter handled?

A. At the end of the night, your Honor, the wholesaler came up and I gave him his share and kept mine.

Q. What do you mean by "his share"?

A. The wholesale price of the papers was 3 cents a copy; the retail price was 2 cents.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): You mean 5?

The Court: 5 cents.

The Witness: The retail price was 5 cents; my profit was 2 cents.

The Court: You turned over the 3 cents to the wholesaler? A. That's right.

Q. (By Mr. Jacobs): Mr. Parrish, isn't it true that one of the demands and one of the grievances in your negotiations with the publishers in negotiating for the first contract of August 31, 1937, was that the wholesalers were exercising and abusing their authority over the vendors?

Mr. Fink: Objected to as incompetent, immaterial and irrelevant, and calling for the conclusion of the witness. [194]

The Court: Well, it does, whether they were exercising their authority. I will sustain the objection.

Mr. Jacobs: I will reframe the question.

Q. Isn't it true, Mr. Parrish, that in negotiating for the contract of August 31, 1937, one of the reasons why the union wanted a contract with the publishers was because the membership of the union thought the wholesalers were exercising too much supervision and control over the vendors?

Mr. Fink: Objected to upon the same identical grounds.

Mr. Jacobs: I will strike the words "too much."

Mr. Fink: It is still objected to upon the same identical grounds.

The Court: I will sustain the objection. I can't see the particular relevancy of that.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): Prior to August 31, 1937, did the wholesalers give any instructions or orders to the vendors? A. Yes.

Q. Will you state the nature of those orders?

A. I know it from hearsay; I never received any myself.

The Court: Well, then, I don't want to hear hearsay. Let's get on to some other subject. We are wandering off too far now.

Q. (By Mr. Jacobs): You said you were selling at Fifth and Powell.

A. Powell and Market.

Q. Powell and Market. How long did you sell there? [195]

A. Until about—I can tell you better by referring to the minutes, your Honor. The last day that—or the last night, I might say, that I sold papers at the corner of Powell and Market, to the best of my knowledge, was Thursday night, it would be May 27th.

Q. Of what year? A. 1937.

Q. Did you sell papers at another corner thereafter?

A. Yes, I sold papers more or less extra for the period of time of the negotiations.

Q. Where?

A. All over town; I don't recall the corners.

Q. At various corners all over town?

A. Yes, off and on.

Q. On each occasion, did you go to the publishers? A. I beg pardon?

(Testimony of William Parrish.)

Q. In each case did you go to employees of the publishers and ask to sell at those various corners?

A. Well, you see, the wholesaler in the alley; "Have you got anything open?" or "Is there a corner open?" If there was, "How about tonight?"

Q. Prior to August 31, 1937, you dealt with the wholesalers, is that right?

A. In some instances.

Q. In other cases with the street circulation editor?

A. Well, with the street man.

Q. Street man. What is the street man? [196]

A. He is the straw boss, you might say.

Q. Straw boss employed by the paper?

A. That's right. He is over the drivers.

Q. And when did you next get a regular corner to sell papers?

A. The contract went into effect August 31st, I believe. About September 5th I began selling Call-Bulletins at the corner of Bush and Battery.

Q. Was that a newly opened corner?

A. That was a corner that was created, due to the ratio which was established in the agreement.

Q. How long did you continue to sell there?

A. A period of about five weeks.

Q. In that case, you dealt with the publisher in obtaining the corner?

A. Yes, that was the agreement.

Q. Who did you deal with in selling papers on that corner—the wholesaler or some other person?

A. Well, I went down to the alley and asked Tony Baccoccio if there was anything open.

(Testimony of William Parrish.)

Q. Who is Tony Baccoccio?

A. He was the street man for the Call-Bulletin.

Q. Continue.

A. He said, "I got Bush and Battery open." I said, "I would like to have a contract for it." So he gave me one.

Q. Was that a more lucrative corner than you had previously?

Mr. Fink: Objected to upon the ground that it is incompetent, [197] immaterial and irrelevant.

The Court: Well, I will overrule the objection. Yes or no?

A. Yes.

Q. (By Mr. Jacobs): How long did you remain there? A. Four or five weeks.

Q. Four or five months. Then where did you go?

A. Weeks.

Q. Then where did you go?

A. I made a swap with the vendor who was selling Examiners—

The Court: Please, Mr. Parrish; this Court has a lot of cases to try, a lot of litigants waiting, and while this controversy is very important to you gentlemen, other people have to have their day in court. So please answer just precisely the question asked.

The Witness: Yes.

The Court: Even though you would like to talk about it—I can understand that—but just answer the question precisely and let's move along a little faster.

A. The S. P. Depot for the sale of the Examiner.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): Who did you deal with there? How were you engaged to sell at that corner?

Mr. Fink: Object to the form of the question. He wasn't engaged by anybody.

Mr. Jacobs: I am trying to pick the least provocative word. [198]

The Court: Who, if anyone, did you make arrangements with?

A. I arranged the deal to swap corners with Mr. Cassidy, who was the circulation manager.

Q. (By Mr. Jacobs): Who was on that corner previously? A. Harry Rogers.

Q. And he was transferred to another corner?

A. He went to the Bush and Battery corner that I was selling at; it was a swap.

Q. That was arranged with Cassidy, who was the circulation editor of the San Francisco Examiner?

A. The circulation manager.

Q. And how long did you remain there?

A. Until the signing of the 1939 agreement.

Q. Then where did you sell papers?

A. 24th and Potrero.

Q. Who made arrangements for you to sell there?

A. The corner became vacant. I was asked if I desired a contract for the corner, and I accepted it.

(Testimony of William Parrish.)

Q. Who asked you?

A. I believe again Mr. Cassidy of the Examiner.

Q. How long did you remain there?

A. I remained there until, I think, April of 1940, the early part.

Q. Then what did you do?

A. I became business representative of the union. [199]

Q. Did you cease selling papers?

A. That's right.

Q. When did you recommence selling papers?

A. On my return from the Island in 1942.

Q. Where did you sell papers then?

A. I had what is commonly called a swing.

Q. A what?

A. A swing. A swing. I had a swing corner.

Q. Yes. Which means what?

A. One night at one corner, another night at another corner. You see, the corners are set up on the basis of six days, your Honor, and the seventh day we operate swings.

Q. Who engaged you to sell on the swing?

Mr. Fink: Object to the form of the question.

Q. (By Mr. Jacobs): Who arranged——

The Court: With whom did you make arrangements for that?

A. The business agent of the union.

Q. (By Mr. Jacobs): Did he submit your name to the publisher?

A. I don't know how he done it; he just told me to go, so I went.

(Testimony of William Parrish.)

Q. When did you next get a regular corner?

A. When Mr. Reilly, who was selling the Bridge Terminal, went into the service I was given the contract to sell at the Bridge Terminal, Examiners only.

Q. That was a lucrative corner, was it not?

A. I beg pardon? [200]

Q. That was a lucrative corner?

A. Yes, that was.

Q. And the vendor who was occupying that corner eventually came back from the service, did he not? A. That is right.

Q. And he requested to be restored to that corner, did he not?

Mr. Fink: Just a moment. If your Honor please, that is objected to as incompetent, immaterial and irrelevant, being improper cross-examination, and shedding no light on this controversy whatever.

The Court: I will overrule the objection. You may answer.

A. The fact that he wanted his corner?

Q. (By Mr. Jacobs): Yes.

A. Why certainly.

Q. And you had to give up the corner, did you not? A. It is part of the agreement.

Q. With whom? What agreement?

A. Part of the agreement with the publishers.

Q. Between who and the publishers?

A. The union.

(Testimony of William Parrish.)

Q. You were sent to another corner, were you not?

A. Well, I obtained another corner.

Q. Was there a man on the corner you obtained?

A. No, the corner was a vacant corner.

Q. Mr. Parrish, starting with the day's routine in the sale of papers, do I understand you correctly the runner comes up with the first edition and drops fifty papers, is that correct?

A. That is correct. [201]

Q. And that is automatic, isn't it?

A. Yes.

Q. Is that the wholesaler who delivers—the runner, or is it the wholesaler himself who delivers the papers on that first fifty?

A. No, it isn't the wholesaler for the district; it is what we know in the trade as a runner.

Q. He is an employee of the publishers passing by?

A. Yes.

Mr. Fink: You must answer the question. Shaking the head doesn't mean anything.

A. Oh, pardon me. Yes.

Q. (By Mr. Jacobs): It is my understanding, under the 1937 contract that when you or anybody else is engaged to fill a full time corner, you are engaged to work a week of forty-eight hours, six days a week, is that correct?

Mr. Fink: Objected to upon the ground that the contract speaks for itself; secondly, upon the ground that the form of the question is an attempt

(Testimony of William Parrish.)

to put words in the witness' mouth to which he has not testified.

The Court: The first ground of the objection is good. I can read that in the contract, too.

Q. (By Mr. Jacobs): Do you know what time, under your contract, you were expected to be on the corner at which you had the contract to sell papers? A. Yes.

Q. That is the time the runner is dropped, is it not? A. No, not necessarily. [202]

Q. What time were you expected?

A. Press release time.

Q. Is that the time the papers come off the press, or the time the papers come to you?

A. That is the time—I don't know exactly how to explain it, your Honor. We have what we call—we always consider press release time. The papers might roll off the press twenty-five or thirty minutes before that, but these papers make agreements between each other whereby they agree that they will not sell prior to a certain time.

Q. Are you expected to be on the corner prior to the time that papers can be sold? I haven't got it clear in my mind, Mr Parrish. A. No.

Q. What is that? A. No.

Q. I am not clear in my mind when you are expected to be on the corner under the contract.

Mr Fink: Expected by whom?

Mr. Jacobs: Expected by the person with whom you have the contract, the publisher.

(Testimony of William Parrish.)

Mr. Fink: If that is the case, I object to the question upon the ground that the contract speaks for itself.

The Court: I think it does. When do you get to the corner? Let me decide that. Just tell me the fact.

A. If the time starts a quarter to six, I walk over to the corner about quarter to six, your Honor.

Q. In the morning? A. No, at night.

Q. At night? A. Yes.

Q. (By Mr. Jacobs): Are the papers usually dropped at that time?

A. Generally, the Examiner is already there.

Q. The original order of fifty copies is left in a bundle? A. Yes, sir.

The Court: Perhaps we had better take the afternoon recess at this time.

(Recess.)

Q. (By Mr. Jacobs): Mr. Parrish, you testified from time to time you have contracted to sell papers on new corners—corners which were new to you. How did you learn when the papers would be dropped at that corner?

A. Well, that is simple.

Q. That may be simple for you.

A. The starting times for all corners over the entire city are the same.

Q. Do you mean the papers are delivered simultaneously to all the corners? A. No.

(Testimony of William Parrish.)

Q. What you mean, you are expected to be on the corner at the same time, press release time?

A. If any papers arrive there after press release time, prior to the time that he arrives there and they are lost, he is responsible for them.

Q. All vendors, including yourself, are expected to be at the corner at press release time? [204]

Mr. Fink: Objected to upon the ground that the question is vague and ambiguous. Expected by whom?

Mr. Jacobs: I am trying to establish the time of beginning. The point was brought out this morning that it was the same for all corners. All I am trying to establish is when the work day begins.

The Court: When does the working day begin? Was that uniform at all times at all corners?

A. Yes, it is.

Q. Most of the vendors all get there about the same time?

A. The beginning time is uniform, city-wide. Then the finish is the same.

Mr. Jacobs: When does the working day end?

A. You begin at quarter to six. Your sales period ends at 1:30, I believe.

Q. When do you normally receive your last delivery of papers?

A. At the present time I receive it——

Q. No, at the time of which you speak.

Mr. Fink: What time is that, counsel?

Mr. Jacobs: I presume we are addressing this to the years 1937 to 1940. I think the witness indicated he understood.

(Testimony of William Parrish.)

A. I am sorry, I didn't understand your question. The year 1937, your Honor, to the year 1940, press release time was 7:15. [205]

Q. That is when the working day began, is that right?

A. That is when the sales period began.

Q. When did it end?

A. It was concluded at 3:15 during the years 1937, and in 1939, when the new agreement went into effect which changed the hours from forty-eight to forty-six, there was a twenty minute chop off.

Q. Is the sales period the same on Saturday as it is daily? A. No.

Q. What is the difference?

A. Well, the sales period during that period of time Saturday began at five and was completed at three or four.

Q. In the year 1937, for example, how long before the end of the sales period would you receive your last delivery of papers?

A. Your last delivery would be what is commonly called the midnight edition, which comes out some time around midnight.

Q. With respect to Saturday?

A. The same thing.

Q. Now, when you received your first fifty by the runner, there was no payment made to the runner, was there? A. No.

Q. How soon thereafter would you see the wholesaler?

A. Possibly thirty-five to forty minutes.

(Testimony of William Parrish.)

Q. He would give you some more papers, would he not? A. That is right.

Q. No payment was made at that time, was it?

A. If he wanted payment for the amount of papers I had sold up to that time, I would have to pay him.

Q. If he demanded payment, you would pay for the amount of papers which had been sold?

A. That's right.

Q. Was that the contract?

A. I say it could be done; it isn't the practice.

Q. In fact, it never has been the practice, has it?

A. In some instances.

Q. On busy corners?

A. No. A man looks like he might get drunk.

Q. That has happened?

A. Yes. In some of these records that you asked for you will see what I mean.

Q. The wholesaler would go on and complete delivery to his district after he left you, is that right? A. That's right.

Q. Frequently he would return by your corner, would he not? A. It has happened.

Q. And frequently he would stop, would he not, to see whether you had enough papers?

A. Sure.

Q. And you would consult together to determine whether more papers were needed, would you not?

A. That's right.

Q. And has it happened on occasion, Mr. Parrish, that you have had a surplus of papers which

(Testimony of William Parish.)

you did not think you could sell and made arrangements with the wholesaler that he would take some of those back and deliver them to people who did [207] need them for sale?

A. That has been done.

Q. After the delivery of the first edition by the wholesaler and after he came back, when would you next see him?

A. I am afraid I didn't get that question.

Q. After you saw the wholesaler on the first delivery and after he had returned by your corner to see whether you needed any more papers, what would be the next time thereafter that you saw him?

A. The next edition.

Q. How much later would that be—still thinking of 1937?

A. 7:15; about quarter to 9:00—I would say 8:30 or quarter to 9:00.

Q. How much of a gap was there between delivery of the first and second editions?

Mr. Fink: I submit that that is a mere matter of computation.

A. An hour and fifteen or an hour and a half.

Q. (By Mr. Jacobs): Would you see him between that time at all? A. Well—

Q. He checks back over his route, doesn't he?

A. Not necessarily. He might come back by the corner on his way in to the plant.

Q. He would deliver you some more papers on the second edition. Did you make any payment for the papers at that time?

(Testimony of William Parrish.)

A. If he asked for it, I would. It has never been the practice during the week—— [208]

Q. In your experience——

Mr. Fink: Just a minute. Let the witness answer the question.

Mr. Jacobs: I thought he had.

A. I has never been the practice during the week. At one time it was a definite practice on Saturday nights alone.

Q. What period was that?

A. That runs back over the years before the first contract up until—I believe we even had some of it during the war. It is more or less——

Q. In your personal experience, it wasn't the practice?

A. I used to pay for my papers at the Bridge Terminal whenever I got them, that is, on a Saturday. It saved me a lot of trouble.

Q. Thereafter, when would you get the next delivery of papers?

A. I would say around 10:30.

Q. And between the second and third edition—is that next delivery another edition?

A. 10:30 would be another edition, yes.

Q. Isn't it true that between the second and third edition the wholesaler would check back over the corners in his district to see whether they needed papers?

A. Not necessarily.

Q. It has been done, hasn't it?

A. Oh, yes.

(Testimony of William Parrish.)

Q. And he might check back over that wholesale route several times? That has been done, too, hasn't it? [209]

A. I don't know how he would do it several times.

Q. The third edition you are speaking of, is that the last edition you receive? A. No.

Q. You receive another edition at what time?

A. Some time around midnight; generally about 12:15 or 12:20.

Q. Then between the third edition and the midnight edition, you have seen the wholesaler come back to you to check whether you had sufficient papers or too many papers?

A. I have seen him go by the corner.

Q. He has consulted with you personally, has he not?

A. He would drive up and say, "Have you got enough?"

Q. Based upon your experience as a news vendor and business agent and Secretary-Treasurer of the Union, isn't it the uniform practice for the wholesalers to obtain payments of the alleged wholesale price from the vendors some time after delivering the last edition and before the end of the sales period? A. That's right, yes.

Q. Hasn't that been the practice?

A. Since——

Q. No, in the period 1937 to 1940? A. No.

Q. When was——

A. Not the general practice. It did happen, though.

(Testimony of William Parrish.)

Q. I read to you from the 1940 contract, Section 9:

“It is agreed that the present practice of making payment toward the end of the selling period or after each edition shall be continued.”

A. That's right.

Q. So it was one of the established practices to collect towards the end of the selling period and after the delivery of the last edition?

A. Your question was whether or not on the delivery of the last edition did we pay?

The Court: No, no, he said after the delivery of the last edition.

Mr. Jacobs: And before the end of the selling period.

The Court: And before the end of the selling period.

A. Oh, yes, that is correct; but I think that the 1940 agreement also carries an arbitration award which changed that to a great extent.

Mr. Jacobs: That may be.

Mr. Fink: Counsel, may I interrupt just a moment? What Section are you reading—the 1940 agreement?

Mr. Jacobs: Yes.

Mr. Fink: What section?

Mr. Jacobs: Section 9a, the second sentence.

Mr. Fink: Section 9a. If your Honor please, this isn't very important, but there is an optional

(Testimony of William Parrish.)

provision there. The section reads—the sentence of the section reads:

“It is agreed that the present practice of making payment toward the end of the selling period or after each edition shall be continued.”

Mr. Jacobs: Are you suggesting that I didn't read it as [211] you read it, Mr. Fink?

Mr. Fink: I am suggesting that your question did not incorporate the whole sentence.

Mr. Jacobs: I want my statement read to the Court.

The Court: Don't get excited.

Mr. Jacobs: That is the second time I have been accused of a misstatement to this court.

Mr. Fink: I didn't accuse you of a misstatement. I said your question did not include the alternative. There is an option in the sentence.

The Court: Go ahead.

Mr. Jacobs: I will withdraw it.

The Court: Ask another question.

Q. (By Mr. Jacobs): Now, that period of making payment for papers between the delivery of the last edition and the end of the sales period is known as the check-in, is it not?

A. That's right.

Q. Now, at that time the news vendors pay a specified amount for each paper which has been sold, is that right?

A. Pays for the amount of papers that he sold, yes.

(Testimony of William Parrish.)

Q. Yes. There is no payment made for papers which have not been sold?

A. Under the section which you read there, the vendor has an alternative; he can check in all of his papers, yes.

Q. I am talking about the practice in actual operation. [212]

A. That was put into operation—that was the arbitration award which I spoke of, which is part of the section which you read, Mr. Jacobs.

Q. You mean to suggest that nobody ever paid for just the papers which had been sold?

A. Well, I can't answer for everybody.

Q. Aren't you familiar with the practice as business agent?

A. I would say that the practice was, if the vendor did check in early, was to pay for all of the papers.

Q. Now, Mr. Parrish, at the time of checking in—the checking in was done by the wholesaler, was it not? A. That's right.

Q. The wholesaler and the vendor would consult as to the number of papers which would be needed for the remainder of the selling period, would they not?

A. The vendor would say, "I will keep out so many," and pay for whatever the thing called for.

Q. The papers he kept are known as the holdout, are they not? A. That is right.

(Testimony of William Parrish.)

Q. Was any accounting made for papers upon the amount of unsold papers held out on the following day? A. You get credit for them.

Q. On the following day?

A. That's right.

Q. He contacted the wholesaler at that time and if he had not made payment for the papers he would pay for those which had [213] been sold and get credit for the papers unsold?

A. The general practice upon returns from the night before, from Tuesday checking and on Wednesday night you hand those papers back, they are returns.

Q. Does that practice prevail on Saturday night, too?

A. Saturday night you check in complete.

Q. What do you mean by that?

A. Well, they have special wholesalers on Saturday night who come around and pick up the returns and check you in complete. When you check in Saturday night, there is no more.

Q. At the end of the selling period——

Mr. Fink: Just a minute. Let him answer the question.

A. When you check in on Saturday night, you are through.

Q. (By Mr. Jacobs): These special wholesalers you are speaking about, check you in at the end of the selling period?

A. As close to it as they can, but when they do check you in they check you in complete.

(Testimony of William Parrish.)

Q. Now, Mr. Parrish, with respect to the amount of the papers that the vendor receives from the wholesaler, now, in your experience, when you first went to a new corner didn't you ascertain from the wholesaler what the normal sales were at that corner? A. Yes.

Q. That is, the normal sale is known as the draw, is it not? A. That is correct.

Q. And the wholesaler would deliver this corner five hundred [214] or a certain number, is that correct? A. That is right.

Q. Now, did I understand you correctly to say that frequently papers would be dropped before the beginning of the selling period at the corner?

A. That is correct.

Q. Isn't it also true, Mr. Parrish, that when a good story breaks—by a good story, I mean a story which might sell a lot of papers, breaks, that the first edition that the wholesaler drops at the corner, he drops an additional number of papers which he thinks the vendor can use at that corner?

A. Why, certainly.

Q. And by the same token, if the day turns out to be rainy he drops a lesser amount of papers, doesn't he? A. Not necessarily.

Q. But he has frequently done that?

A. You don't understand selling papers, I guess.

Q. That is what I am trying to find out, Mr. Parrish.

A. The weather, except certain corners, has nothing to do with the sale of papers, Mr. Jacobs.

(Testimony of William Parrish.)

Q. In other words——

A. There is a normal sale on the corner day in and day out, whether it rains or whether the sun shines.

Q. I see; but good stories will affect the situation?

A. Oh, no, you were talking about good stories and weather; I am talking about normal sales.

Q. Now, Mr. Parrish, at the end of the checking in [215] period—you identified a sales slip that you got from the Chronicle, I believe, did you not?

A. I think that was a consolidated sales slip, Mr. Jacobs, if I am not mistaken.

Mr. Jacobs: May I have the exhibit?

Mr. Fink: About 46; somewhere around there. Two of the very small slips. They are all the same.

Q. (By Mr. Jacobs): I show you Plaintiffs' Exhibit 46, which reads: "Chronicle sold"——

A. Read the rest.

Q. Also it says, "Examiner sold."

A. All right.

Q. Did you sell Call-Bulletins on your corner?

A. We are talking about 1937 now?

Q. 1937 to 1940.

A. Well, during that period of time I sold Call-Bulletins and also sold the Examiner, and also sold the Examiner and Chronicle.

Q. Now, when you sold two papers, would the Chronicle wholesaler fill out the Chronicle portion of it, and the Examiner——

A. During that period of time we did not have that type of sales slip.

(Testimony of William Parrish.)

Q. What type of sales slip did you have?

A. It was somewhat similar—that is, the Examiner was similar to that, with the exception that it didn't carry the word "Chronicle" in the right-hand corner.

Q. Just a minute. I think I can show you a sales slip.

May this be marked for identification, please?

The Clerk: Defendant's Exhibit K for Identification.

Mr. Fink: May I see what form you are using, Mr. Jacobs?

Mr. Jacobs: I will give you one.

Mr. Fink: Thank you.

Q. (By Mr. Jacobs): I show you defendant's Exhibit K for Identification, and ask you if you recognize it?

Mr. Fink: You don't have to. I will stipulate that is one of the forms used.

Mr. Jacobs: I want to have it identified, anyway.

A. This is a Chronicle sales slip, but it isn't the sales slip that was in use in 1937.

Q. Was it in use any time in 1937 to 1940?

A. I wouldn't answer that, Mr. Jacobs. I think that very properly could be asked from the circulation manager, because I don't recall the sales slip of that time. As a matter of fact, I will directly state that the Chronicle did not, to my knowledge, use that sales slip.

(Testimony of William Parrish.)

Q. Did they use a sales slip containing the same information?

A. Yes, their sales slips had the amount out, amount sold, amount returned.

Mr. Jacobs: The Government offers in evidence Defendant's Exhibit K.

Mr. Fink: No objection; there is one in already. They are substantially the same.

Mr. Jacobs: I do not agree with him, your Honor. The [217] other one is a joint sales slip.

The Court: It may be marked.

(Thereupon the sales slip referred to was marked Defendant's Exhibit K in evidence.)

Q. (By Mr. Jacobs): Isn't it true in the years 1937 to 1940 that the wholesaler who brought the other papers would also deliver to you a sales slip containing the same information at the time you checked in?

The Court: He wants to know if the wholesalers from the other newspapers used a slip substantially containing this data?

A. I don't get the meaning of the question, your Honor. If I was on the Call-Bulletin—if I was selling the Call-Bulletin, I received a Call-Bulletin sales slip. If I was selling the Examiner, I received an Examiner sales slip.

Q. They were all substantially alike?

A. Yes, they all contained more or less the same, with the exception of the Call, which had very little.

Mr. Jacobs: Will you stipulate——

(Testimony of William Parrish.)

Mr. Fink: You don't have to examine on it. I will stipulate it was in use.

Mr. Jacobs: Mark that, please.

The Clerk: Defendant's Exhibit L for Identification.

Mr. Jacobs: Counsel stipulates that Government's Exhibit L is a form of sales slip in use during the period 1937 to [218] 1940.

Mr. Fink: Used by the Call-Bulletin, as I remember, yes.

The Clerk: You are offering this?

Mr. Fink: I call attention to the fact that this one is dated 194 blank. I will stipulate it was in use, or one substantially the same was in use.

(Thereupon the sales slip referred to was marked Defendant's Exhibit L in evidence.)

Q. (By Mr. Jacobs): In any event, Mr. Parrish, at the end of the time on the check-in you would get a sales slip from the wholesaler from each paper?

Mr. Fink: Each paper that he sold.

Mr. Jacobs: I don't see how he could get one from one he didn't sell.

Mr. Fink: For heaven's sake! He has told you he didn't sell all papers.

Q. (By Mr. Jacobs): Now, Mr. Parrish, you stated that you had seven weekly customers from whom you collected weekly, is that correct?

A. Yes.

Q. What period was that? A. 1937.

(Testimony of William Parrish.)

Q. 1937. At that time how many papers were you selling daily, approximately?

A. I was making a little bit better than the guaranty—a little bit better than the guaranty.

Q. Do you know how many papers that involves? [219]

A. Well, it involved some \$15.00 a week.

Q. If my mathematics is good——

A. You want to remember there is Saturday night in there, Mr. Jacobs.

Q. Daily, I am talking about. Do you remember daily how many papers you would sell?

A. I would have to average better than two dollars and a half a day to make \$15.00. I do not recall the exact number of weeks.

Q. Two and a half a day would mean 125 papers, would it not, approximately? A. Yes.

Q. Mr. Parrish, you stated on direct examination that you never received any orders or instructions from the employees of the papers for whom you sold papers. What occasion would there be, if any, for receiving these orders?

Mr. Fink: Objected to upon the ground that it is calling for an opinion and conclusion of the witness.

Mr. Jacobs: I can't think of anybody better qualified to give that opinion. This is cross-examination.

Mr. Fink: I will withdraw the objection.

The Court: All right.

(Testimony of William Parrish.)

A. There would be no occasion—or, I might say, there has been no occasion since I have been selling for orders or instructions to be given.

Q. (By Mr. Jacobs): Now, you stated on direct examination that prior to 1938—and correct me if I am wrong—during [220] the time the union contract was in force, whenever there was a vacant corner the publisher would call up the business agent of the union and ask them to submit names of vendors available, is that correct?

A. No, I didn't testify to no such thing.

Q. Do you remember your testimony on that point?

A. I testified that prior to the conclusion of the 1938-39 negotiations, that under the terms of the agreement the vendors went to the alleys and received their contracts there.

Q. Let me ask you, Mr. Parrish, whether you testified or not, isn't it true that in 1937 whenever a corner became vacant the representatives of the employees of the publishers would call up the representatives of the union and ask them to submit names of union members?

A. No, that is not correct; it is not the practice.

Q. How were the vendors obtained for new corners or vacant corners?

A. The vendors would go down to the alley and find out if there was any vacancies and if there was a vacancy, apply for it.

(Testimony of William Parrish.)

Q. The vendors would go down into this alley?

A. Yes.

Q. By the alley, you mean the premises adjoining where the papers came off the press?

A. That's right.

Q. And isn't it true today, Mr. Parrish, that from time to time the employees of the publishers call up the business [221] agent of the union and state to him that a certain vendor has not reported, or a certain corner is not filled, and ask you to furnish one?

A. Certainly, that is the contract.

Q. Doesn't that happen frequently today?

A. It has happened frequently since 1939.

Q. On such occasions they ask the business agent of the union or the other employee of the union to tell them all the names of individuals who are available to fill those corners, don't they?

A. It does happen that way, yes.

Q. The employees of the paper will state to the business agent or other employee of the union which individual they want?

A. If you submit a list of names, naturally, then, he selects the one that he wants.

Q. Now, prior to August 31, 1937—that is, prior to the first union contract, and after April 1, 1937, isn't it true that the publishers would dismiss vendors, first, for not paying sufficient attention to the sale of papers?

A. I wouldn't deny the statement.

Q. I beg your pardon?

A. I wouldn't deny the statement.

(Testimony of William Parrish.)

Q. And isn't it also true that they would dismiss them because they failed to show up on the corner at the appointed time properly?

A. I don't—there were vendors who lost their corners for a great many reasons.

Q. And what were some of those reasons?

A. Drunkenness. Some cases, I think perusal of our agreement will show you some of the things which we corrected.

Q. Just tell me what are some of those things? Lateness?

A. No, that isn't any of the questions that came up in that.

Q. Now about failure to stay on the corner?

Mr. Fink: Just a minute. Were you through with your answer? A. No.

Mr. Jacobs: Go ahead and finish it.

A. Not all of the representatives of the publishers—not all of the publishers, but some of them, and a great many of their representatives prior to the organization, considered themselves little tin Jesuses.

The Court: Well, now, Mr. Parrish, the question was very simple. He just wanted you to state what were the reasons or causes for the dismissal of the men who sold papers at the corners by the publishers in the period from April to August, 1937, if you know. If you don't know, you can't answer.

A. Failing to show up.

(Testimony of William Parrish.)

Q. You gave one cause, drunkenness.

A. Drunk; failing to show up at the corner; doesn't like your looks; wanted to put somebody else on the corner.

Q. (By Mr. Jacobs): Who doesn't like your looks? A. Well, the wholesaler.

Q. Failure to stay on the corner, I presume?

A. Imagine that would be one of the reasons.

Q. Now, at that time, that is, April 1, 1937, to August 31, 1937, the wholesaler was handling vendors with respect to that punishment, was he not?

A. That doesn't hold true for that full period of time.

Q. It was true part of the period, was it not?

A. Part of the period.

Q. And isn't it true also that men were transferred from one corner to another for the same reasons during the same period?

A. I don't know about the reasons for transfers, but there have been transfers executed from one corner to another since I have been in the sale of papers.

Q. Sometimes it is for cause, and sometimes it isn't? A. You are correct.

Q. Some of the causes have been those you just state? A. It could possibly be.

Q. Is it or isn't it?

A. I don't know of my own knowledge.

Q. You don't know of your own knowledge?

A. I can't recall any definite transfer of a vendor for any of the reasons which I stated.

(Testimony of William Parrish.)

Q. Do you recall whether a man has been told by a wholesaler that he isn't wanted any more and no reason is given at all? A. Yes.

Q. Do you also know that men have been transferred from one corner to another without any stated reason? [224]

A. I wouldn't answer that question, because I couldn't give you a direct—I couldn't give you a direct answer on the question.

Q. Do you know whether vendors have been laid off by wholesalers in this period for the causes you have stated? A. Yes.

Q. Now, subsequent to August 31, 1937, Mr. Parrish, did that practice change? A. Yes.

Q. And if so, when?

A. Oh, I would say, along about the organization time of the union it began changing.

Mr. Fink: That was May, 1937? A. Yes.

Mr. Jacobs: Do you want to examine him, Mr. Fink?

Mr. Fink: I wanted to identify the time for the record.

Mr. Jacobs: He has already testified to that.

Mr. Fink: Pardon me; I just wanted to get it again.

A. The change, Mr. Jacobs, became evident when the wholesalers themselves formed a union. They seemed to show a great deal more consideration for the vendors than they had in the past, possibly with the thought in mind that they would use them in the future.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): In what respects did the practice change after August 31, 1937?

A. After August 31?

Q. Yes.

A. From that date on the wholesaler had no control over the individual vendor. [225]

Q. Now, you stated on direct examination that from time to time the union would punish its members in one form or another, discipline its members in one form or another, for violations of the contract, is that right? A. That's right.

Q. And that would include the various causes that you stated a moment ago, would it not? Drunkenness, failure to report, not staying on the corner, not paying attention?

A. Well, I don't know about the not paying attention.

Q. We will exclude that. All the other reasons you stated? A. Yes.

Q. Isn't it also true, Mr. Parrish, that you learned of those violations of the contract from the employees of the publisher?

A. Not all the time.

Q. That was frequently the case, was it not?

A. It has been the case, yes.

Q. Do you know how that information was obtained by the employees of the publisher?

A. Well, the wholesaler reported to the street man, and the street man took the matter up as a matter of violation of the contract between the union and the publishers.

(Testimony of William Parrish.)

Q. And the union in turn would act upon the complaint submitted by the employees of the publisher, is that correct?

A. The business representatives would investigate it, yes.

Mr. Jacobs: May this be marked for identification, please? [226]

The Clerk: Defendant's M for identification.

Q. (By Mr. Jacobs): I show you Defendant's Exhibit M for Identification, and ask you if you recognize it?

A. Yes, it is a complaint form which was put in use at one time.

Q. By whom? A. By the union.

Q. At what time?

A. Oh, I believe it was around the end of 1939; it could possibly have been in the middle part of '39.

Q. Referring to Defendant's Exhibit M for Identification, I notice it is called "Complaint Form," and it says, "Name of vendor making complaint." And this complaint says the complaint was made by the office. By that I take it you mean the publisher?

A. No, it means that particular complaint was made by myself.

Q. You being the office in this case?

A. Yes.

Q. And refers to the name of the wholesaler with respect to that particular complaint?

A. Well, I don't know; I haven't read it.

(Testimony of William Parrish.)

Q. You notice it states here, Mr. Parrish, that the complaint was received by Mr. Parrish from the office.

A. I don't see what you mean.

Q. Right here, "Complaint received by W. B. Parrish; From whom, Office."

A. Well, I just filled in the word because I have used my name up at the top.

Q. Mr. Parrish, after this form was inaugurated by the union [227] was this sort of form used to record complaints received from the publishers?

A. No, that was not—no, we didn't use that for that. Those forms were printed or were procured in the first instance to keep a check of all of the violations on the part of the publishers in regards to the agreement.

Q. I see. You weren't interested in violations of the contract by the vendors?

Mr. Fink: Now, just a minute. Are you withdrawing that document that has been marked for identification?

Mr. Jacobs: I haven't offered it.

Mr. Fink: You had it marked for identification.

Mr. Jacobs: Yes, but that doesn't mean—

Mr. Fink: I would like to have it remain in the custody of the Clerk.

The Court: It remains in the record; otherwise we wouldn't know what document you were referring to in your question.

Mr. Jacobs: Sorry.

(Testimony of William Parrish.)

Q. Isn't it true that after August 31, 1937, that the publishers from time to time discontinued their contract with individual vendors because of the various reasons you have stated?

A. Yes—not all of the reasons stated.

Q. I beg your pardon?

A. Not all of the reasons.

Q. Not all of the reasons? A. No. [228]

Q. Would you give some of the reasons that they discontinued the contracts after August 31, 1937?

A. Drunkenness on the corner was a reason for discontinuance of the contract. Failing to show up at the corner without justifiable reason was reason for discontinuance.

Q. Drunkenness? A. Yes.

Q. Not remaining on the corner for the sales period?

A. Walking off the corner; failing to check in, would be a reason.

Q. Now, you stated on direct examination that you were charged for the newspapers by the wholesaler on a hundred copy basis. You mean you always received the papers in multiples of one hundred?

A. I took the question which I answered to mean that if you sold less than a hundred that you paid on the basis of \$3.00 per hundred, or a dollar and a half for fifty.

Q. Mr. Parrish, did I understand you correctly—and I want to clarify the record on that—in re-

(Testimony of William Parrish.)

ferring to the photographs marked as Exhibits 48-A to 48-H, and particularly to Exhibit 48-C, that there were approximately ten such magazine stands?

A. You are talking about the large stands?

Q. Yes.

A. Yes, I am fairly certain of that.

Q. You also stated on direct examination that approximately a hundred of the vendors sold publications other than newspapers, is that correct?

A. We were talking of the period 1937 to 1940?

Q. That is right. A. Yes.

Q. You also stated—I believe I am correct—that approximately fifty sold articles other than newspapers or publications, is that correct?

A. I beg your pardon?

Q. I think Mr. Fink asked you on direct examination how many people, how many news vendors, or the Court asked you how many news vendors sold articles other than magazines and papers or other publications. A. No.

Q. You haven't testified on that point at all?

A. I am certain in my mind that that question wasn't asked.

Mr. Fink: I think the witness is confused as to the form of your question, Mr. Jacobs, only. I don't want to interrupt your examination.

Mr. Jacobs: I would like to get the matter straightened out. Do you remember the question?

Mr. Fink: Yes, I referred to the sale of razor blades and things of that sort. That may refresh the witness' recollection.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): Do you recall——

The Court: He did say, I think, that the number was approximately fifty. He said that they sold other knick-knacks and articles like razor blades in addition to selling papers.

Mr. Fink: Candy bars and things of that sort.

The Witness: I think I used the expression that there were some who did. I don't believe I used a figure. The word—the number, your Honor, was in the direct question.

Q. (By Mr. Jacobs): Can you state with any reasonable degree of certainty how many such people there were?

A. That would be difficult to do now.

Q. Well, the figure of a hundred you gave, are you confident with any degree of certainty of that figure?

A. A hundred sold publications and so forth?

Q. Yes.

A. That is a low figure for it, Mr. Jacobs.

Q. What do you base your estimate on? Just your recollection?

A. During the period of time, Mr. Jacobs, there was at least thirty-five news stands, or, I will say in 1937 there were at least thirty-five news stands, and then a great many corners that handled just racing forms.

Q. Now, Mr. Parrish, I notice reference in the contracts to call-backs. Will you explain what a call-back is?

(Testimony of William Parrish.)

A. Yes. The explosion at this naval depot across the bay here some year and a half or two years ago was a great selling story. It happens at such times that the publishers wishes to put out additional vendors after they have completed their sales period. Under the contract he has the right to request the vendor to accept a call back. If he accepts it, O.K.; if he doesn't, that is O.K. too. [231]

Q. In the period 1937 to 1940, how did he communicate with the vendor?

A. Well, the wholesaler, the publisher—I imagine the street man says to his wholesalers, “See how many of the fellows will answer a call-back, for in the morning there is a big story breaking.”

Q. Isn't it true, Mr. Parrish, that frequently—or there have been occasions, rather—when the wholesaler would request the vendor to remain on the corner after the end of the selling period, which additional period would be treated as a call-back under the contract?

A. That has happened, yes.

Q. Now, there is also reference in the contract to special events corners. There is reference to special events corners in the contract, which I understood to mean any public gatherings or any special event?

A. Fights, wrestling matches, football games.

Q. Race track?

A. No, we have nothing to do with the race track. This Good Friday, the gathering that is

(Testimony of William Parrish.)

usually around the church over there, that is sort of a special event. [232]

(After recess.)

Q. And does the wholesaler communicate with the vendors to obtain vendors for such special events?

A. They are obtained through the office of the union.

Q. You also spoke on direct examination of certain placards that you referred to as, I think, rack cards.

A. That is right.

Q. Who places them on the corners?

A. The wholesalers.

Q. He places them on racks which are placed there by the wholesaler, are they not?

A. Somebody put the racks there, Mr. Jacobs.

Q. Those racks are the property of the newspaper, are they not? And are they not on the corners throughout the day and night?

A. That is right.

Q. And, of course, the rack bears the name of the newspaper, does it not?

A. Some have been there so long they don't bear any name.

Q. Some are pretty weather-beaten.

A. That is right.

Q. The placard contains the name of the paper, and some feature of the paper, does it not?

A. That is right.

(Testimony of William Parrish.)

Q. Now what is meant by boot-jacking?

A. Boot-jacking is a lost art, but if you ever woke up in the morning about 1:00 o'clock and heard a guy hollering under your window "Extra", that was a boot-jack.

Q. Was boot-jacking carried on in the outer districts of the [Balance missing in copy] [233]

A. I can't recall boot-jacks being used for the last four or five years.

Q. In the period 1937 to 1940 it was used, was it?

A. There were some occasions that the publishers did ask us for boot-jacks. If we had them, we supplied them.

Q. Was boot-jacking carried on in the outer districts of the city?

A. That again, Mr. Jacobs has to do with the type of story you have.

Q. Was it or was it not?

A. Sold in the outer districts, sold downtown here.

Q. On occasions when they were sold in the outer districts, after the vendors were obtained, the boot-jacks, isn't it true the publishers would, on occasion transport the vendors to the area in which the boot-jacking was to be done?

A. I don't recall any instance of that.

Q. And, by the way, papers are delivered to you on the corner by vehicles owned by the publisher, are they not? Papers are delivered to you on the corner in a vehicle owned by the publisher?

A. Talking about the period 1937 to 1940?

(Testimony of William Parrish.)

Q. Yes.

A. During that time the wholesalers owned their own machines. I don't believe the publishers had begun using trucks of their own yet.

Q. Now, Mr. Parrish, are you a member of any other organization besides the union?

A. No.

Q. Mr. Fink asked you, I believe, whether the paper bore any [234] of your expenses.

Mr. Jacobs: Did I understand the question correctly?

Mr. Fink: Substantially.

Q. (By Mr. Jacobs): What expenses do you have, Mr. Parrish, in the sale of newspapers?

A. None that I know of, just except the loss through credit or the wind blowing a paper away which I don't recover and turn in.

Q. Through what medium?

Mr. Fink: The wind blowing the paper away which he does not recover and turn in.

Q. (By Mr. Jacobs): That is the only expense you have. Is that right? A. Yes, sir.

Q. Have you any current expenses at all?

A. No, carfare getting to and from the corner.

Q. Do you keep books and records?

A. No.

Q. Do you advertise in the papers at all?

A. No.

Q. Have you any business fund?

A. No, sir.

(Testimony of William Parrish.)

Q. Have you invested any capital to sell newspapers?

A. Well, I have to be sure that I will have enough money to pay for the papers.

Q. Mr. Parrish, in the period approximately August 31, 1937, were most of the San Francisco newspapers being sold, I say, were most of the San Francisco newspapers being sold in most [235] instances on a basis of exclusive representative?

A. August 31, 1937?

Mr. Fink: After or before, I did not get it.

Mr. Jacobs: On.

A. On August 31, you say?

Q. Yes. A. Were the majority?

Q. No. Were the newspapers, the San Francisco newspapers, The Examiner, The Call-Bulletin, and The Chronicle being sold on the basis of exclusive representation?

A. Not all of them.

Q. That was by far the large majority of the case, was it not?

A. The Call and News were sold on an exclusive representation; The Examiner and Chronicle, with the exception of about, I would say 15 corners, I would not go higher than that, it might possibly be higher, but I don't believe so, were joint representation, all except about 15 corners.

Q. With respect to The Chronicle and The Examiner, can you tell me approximately when it became prevalent for those two papers to be sold on a basis of joint representation?

(Testimony of William Parrish.)

A. It started some time in the month of May.

Q. 1937? A. Yes.

Q. Is it not true, Mr. Parrish, that since April 1939 to 1940 there has been a scarcity of news vendors?

A. Since 1940 there has been a scarcity did you say?

Q. Yes.

A. Yes, during the war years, naturally. [236]

Mr. Jacobs: May this be marked for identification.

(The document referred to was marked Defendant's Exhibit N for identification.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit N for identification, and ask you if that is your signature appearing on the back of it?

A. Yes, I would say it was my signature.

Mr. Jacobs: Thank you.

Q. Mr. Parrish, you did sell The San Francisco Examiner and The Chronicle for some time during 1940? A. Yes.

Q. You were a member of the union at that time? A. Yes.

Mr. Jacobs: No further questions.

Mr. Ladar: I would like to ask the witness a few questions if I may.

The Court: Yes.

(Testimony of William Parrish.)

Redirect Examination

By Mr. Ladar:

Q. Mr. Parrish, calling your attention to this——

Mr. Jacobs: Is it understood that this amicus curiae is going to examine from time to time?

The Court: Have you any objection?

Mr. Jacobs: I just want to know.

The Court: If Mr. Linn wants to ask any we will extend him the same courtesy.

Mr. Linn: I think you are running an awful risk.

Q. (By Mr. Ladar): Calling your attention to Defendant's [237] Exhibit J in evidence, Mr. Parrish, that part of it in particular that is on page 6. Have you got a copy of this? A. Yes, I have.

Q. Just see if you see where I am picking it up:

“There had been quite a number of meetings and the ideas of both parties have been laid on the table.”

Mr. Ladar: For the information of the Court, this is the report of the committee admitted in evidence.

“There had been quite a number of meetings and the ideas of both parties had been laid on the table. That is the most important step in any negotiation. The most important of these steps that we have taken is the matter of relationship which is on the basis of buyer and seller instead of employee and employer.”

(Testimony of William Parrish.)

Then, there follows this sentence:

“We agreed to this because we felt that it did not make any difference what they called us, so long as we got what we wanted in the way of wages, hours and working conditions.”

Q. Mr. Parrish, did the members of the negotiating committee meet and work out the language of that report? A. Yes.

Q. In those meetings, you attended those meetings? A. Yes.

Q. In those meetings, was that language selected for any particular purpose?

Mr. Jacobs: It is immaterial and irrelevant why it was [238] selected, your Honor. The fact was it was selected.

Mr. Ladar: May it please the Court, at the time this was introduced in evidence Counsel made the point that he was going to show the intention by this document. That is precisely what I am trying to bring out.

Mr. Jacobs: Doesn't the document speak for itself?

Mr. Ladar: Not necessarily, if the Court please. A document like this should be explained in the light of its purpose and the circumstances surrounding its execution, particularly if it is put up for the purpose of showing the intention in a contract. It is the report of a negotiating committee.

The Court: What is the question again?

(Question read by the Reporter.)

(Testimony of William Parrish.)

The Court: Well, I don't know how the witness' answer is going to help the Court any, but I am kind of curious to see how he would answer, so I will allow it.

A. Why, yes, for the simple reason that we could not begin negotiations until the question of relationship had been settled. Second, that we had been informed under the laws we were not employees, and we felt that matter really was not of any importance even if we could force the publishers to agree to an agreement that we were employees by a strike action or something, the law itself would determine we were not.

Q. (By Mr. Ladar): Well, Mr. Parrish, what I was trying to bring out in this preliminary is, what were you going to do with this [239] report after you made it up? A. This report?

Q. Yes.

A. We were asking for a strike vote from the men.

Q. Would you take it into the meeting and read it? A. Yes, this is the complete report.

Q. I understand that. I just asked would you take it into the meeting and read it? A. Yes.

Q. In writing up the language of this report were you endeavoring to convey to the union the idea that there had been progress in the negotiations?

A. Yes, and also the fact that we had reached a stone wall. We had to have something to use as a club.

(Testimony of William Parrish.)

Q. Now, prior to the time that you agreed, as stated in here, that there would be a buyer and seller instead of an employer and employee relationship, had you taken the advice of anyone on the buyer and seller relationship?

A. Yes, we had.

Q. Whom did you take advice from?

A. Mr. Kagel of the National Labor Bureau, and John Shelley, president of the San Francisco Labor Council.

Q. After getting advice, without relating statements that anybody made, did the committee meet and express a final agreement to agree with the publishers on that? A. Yes, it did.

Q. Were you present when the committee members expressed their views? A. Yes.

Q. Are you in position to state, after getting that advice, [240] what the views of the various committee members were?

Mr. Jacobs: If it please the Court that is the view of the committee members in that report.

The Court: You object to that last question?

Mr. Jacobs: Yes.

The Court: I think it would be hearsay. I am not interested in what he says somebody else said.

Mr. Ladar: If your Honor please, the whole report is obviously hearsay. It is a report from a committee, one party to a contract, to its own members.

The Court: But the witness has vouched for it. He says that is the written report agreed upon, and that the union accepted.

(Testimony of William Parrish.)

Mr. Ladar: And that is correct. That is the reason I say it is hearsay because obviously, as to this particular plaintiff, obviously something *down* outside of his presence.

The Court: Do you want to ask another question?

Mr. Ladar: It is preliminary to this. I want to ask this final question, if your Honor please:

Q. What did that committee mean by the words, "We agreed to this because we felt that it did not make any difference what they called us, so long as we got what we wanted in the way of wages, hours and working conditions"?

Mr. Jacobs: An objection, your Honor.

The Court: I think it is objectionable, but I would like [241] to see how the witness would answer that. That is a rather clear statement. Did they mean anything else by it other than what was there?

A. We meant simply this, your Honor: On the advice that we had received, we were not employees, we were actually independent contractors.

The Court: That is not what the attorney asked you. That is not what the attorney asked you and it is not what I asked you. Did you mean anything else by the language Mr. Ladar read to you than what the language said? A. No.

The Court: That is what you meant.

A. It made no difference to us.

Mr. Ladar: I don't think you answered the Court's question, personally.

(Testimony of William Parrish.)

Q. Did you mean it made no difference? I will ask the question this way, if I may, your Honor: I call you attention to the words "It made no difference to us what they called us". What did you mean by "What they called us"?

Mr. Jacobs: The same objection.

A. Well, on the basis that we were not employees under the law, to us it made no difference whether we sat down and drew up a contract as independent contractors.

Q. (By Mr. Ladar): So, would you say that you, as one of the members of the committee, believed that what the publishers [242] called you made no difference because of the facts as they were, what they called you was not determinative? Is that what you mean?

Mr. Jacobs: Just a minute.

The Court: That is quite argumentative.

Mr. Ladar: I submit it is argumentative, if your Honor please, but the witness has stated this thing was drawn up for a particular purpose, to put over particular points with their union. He also stated they took advice prior to the time they wrote this up.

The Court: I know, but the last question was very argumentative. You are putting a construction on it that is very argumentative. I think this witness is an honest, straight forward witness. I think when he wrote in that report that it did not make any difference, that is exactly what he meant.

(Testimony of William Parrish.)

Q. Isn't that true? That statement is not a false statement, is it?

A. No, your Honor. We meant exactly that because the question was one which had been decided by the courts.

Mr. Ladar: That is the point. It was decided by the courts. He did not mean it was immaterial. He keeps saying that, but I don't think he says that now.

The Court: To be perfectly honest about it, it did not make any difference to you whether you were an independent contractor, an employee, or what your status was called. You were interested in your economic situation, how much money [243] you would get, how good you could make conditions for you and your associates. That is correct, isn't it?

A. In one sense of the word you are right.

Q. Is it incorrect in any sense?

A. At the time this was drawn up, your Honor, by virtue of the various court decisions we did not feel we were employees, so it made no difference.

Mr. Ladar: That is what I am trying to bring out. That is quite different than the implication sought to be made before, to wit, that it did not make any difference one way or the other, that they did not care how the thing worked out. I think these men took advice, as the witness said today. That is the real answer.

(Testimony of William Parrish.)

The Court: Nobody told you it was unlawful to be an employee of a newspaper publisher, did they?

A. Well, it was stated definitely to us that through court decisions that had been handed down adjudging that news vendors were not employees, that we were independent contractors.

Q. The attorneys did not tell you it was unlawful to be employees, that there was anything wrong in that, did they?

A. No, it was not an attorney, your Honor. It was Mr. Kagel.

Q. (By Mr. Ladar): The newspaper publishers had told you they would not enter into a contract with you on any other basis than independent contractors, had they? [244]

A. That is correct.

Q. Your committee believed that was your status at that time did they? A. That is right.

Mr. Jacobs: I move to strike the last answer. It is in direct conflict with the statement.

Mr. Ladar: I think the matter is one of ambiguity, your Honor.

The Court: I think this matter already has been gone into. It was heretofore stated by the witness, as well as Mr. Bitler, that it was at the request and suggestion of the newspaper publishers that there be an independent contractor relationship. The union acceded to that. That is all I see in the facts. If there is anything different, you gentlemen can correct me on that.

(Testimony of William Parrish.)

Mr. Ladar: I think when your Honor gets around to looking over the evidence, the reason I brought the point up is because I have had experience with reports of negotiating committees; as I stated before, it may be argumentative. It is intended to get over to the members the progress of the negotiations, and the statement in here "We felt that it did not make any difference what they called us" is misleading.

The Court: I think the witness fully stated that. I understood him. So far as the union was concerned it did not make any difference whether they had an independent contractor relationship or were employees. They were [245] principally interested in the economic situation of getting what they *they* thought was adequate compensation and reasonable working conditions. Now, they accepted this contract because they thereby got the condition they wanted. Isn't that right?

The Witness: Your Honor, I imagine in 1937 if we had been informed that under the law we were not employees but were independent contractors, that possibly there would have been a different ending to the negotiations.

Q. Well, if you had been given the same conditions in every other respect, both as to hours, wages or other conditions which are specified in this contract, and were still called "employees", would it have made a difference to you?

A. The difference would be in the language. Perhaps you don't quite get the thought. That is

(Testimony of William Parrish.)

simply this: We, the group first elected to sit down and negotiate with the publishers, did contemplate drawing a contract such as the one we have here today, something that we knew nothing whatsoever about the language, and so forth. That first month, I might say, the committee, including myself, looked at the stuff the publishers handed us, and by golly, you could not make heads or tails of it.

The Court: In order that the Court's examination may be made plainer, I am not deciding by this series of questions whether it is an independent contractor relationship or an [246] employee relationship. Counsel, by examination, opened the question of what the meaning of the language used by the union's committee was and its attitude toward the matter was.

Mr. Ladar: That is the point I wanted to bring out.

The Court: But I don't think that language is ambiguous at all. But, what that has to do with the ultimate question is a matter the Court cannot decide until all the evidence is in.

Mr. Ladar: Just one further question:

Q. Did any member of that committee ever state in your presence that the agreement you had made, that the committee had made, regarding the buyer and seller relationship, was one that would not be lived up to in good faith? A. No.

Q. It was never stated by any member of the committee that it would be taken for just what it was worth?

(Testimony of William Parrish.)

A. When the decision was made on the part of the union to accept a buyer and seller relationship, we accepted it with no strings attached.

The Court: Well, I am not intending to cut your examination off. If you have further questions to ask, go right ahead, but I think we better take the afternoon adjournment at this time.

Mr. Fink: Yes, I have got two or three questions. They will not be long. Your Honor, yesterday in discussing your usual court procedure, said something about your Monday [247] calendar. What time will we adjourn to on Monday?

The Court: I don't see how I could possibly take this case up before Tuesday, because I have a law and motion calendar in the morning, and it is my monthly assignment for naturalization and I have about 20 to 30 contested naturalization cases to hear, besides two criminal cases in the afternoon which they tell me are going to be short. I am afraid we will have to recess until Tuesday.

Mr. Fink: That is all right. I simply wanted to know the time.

If it please the Court, I want to announce once more that after Mr. Parrish is excused from the stand, I will present two more witnesses. Then I will tender to Counsel for the defendant a stipulation to the general effect, as announced yesterday, that additional witnesses from the San Francisco Call-Bulletin and The San Francisco Chronicle are available; that their testimony will be substantially the same in all respects, and there will be variations

(Testimony of William Parrish.)

only in minor details, not affecting the general question, and I will tender that stipulation. If it is accepted, we should be through, so far as the plaintiffs are concerned, on Tuesday.

The Court: Well, I guess we will have to meet that situation when it arises.

Mr. Fink: I simply made that statement for the benefit of Defendant's Counsel. It makes no difference to me.

(Adjourned to Tuesday, April 2, 1946,, 10:00 a.m.) [248]

Tuesday, April 2, 1946, 10:00 A.M.

Mr. Jacobs: If it please the Court, before Mr. Fink commences, he has several times stated that he would call witnesses from one paper and then proffer a stipulation that the representatives of the other papers will testify to the same effect. Without committing the Government in any way, I believe that we would be much more inclined to give favorable consideration to such a stipulation if employees of The Chronicle Publishing Company were called first. Do I make myself clear, Mr. Fink?

Mr. Fink: No, you do not.

Mr. Jacobs: Does the Court understand me?

The Court: Well, you mean it all depends upon the order of proof whether you take the stipulation?

(Testimony of William Parrish.)

Mr. Jacobs: As I understood Mr. Fink's statement, after Mr. Parrish's testimony is over, he will call representatives of The San Francisco Examiner. We would be more inclined to enter such a stipulation if employees of The Chronicle were called first, and then the stipulation proffered.

The Court: Suppose we leave that until we finish the testimony of this witness and see how we get along.

WILLIAM PARRISH

recalled.

The Court: Is this witness on the stand for further [249] cross-examination, or is that completed?

Mr. Fink: No. The cross is concluded, your Honor. He is on redirect examination.

Redirect Examination

By Mr. Fink:

Q. Mr. Parrish, in your testimony you have testified from your knowledge as a member of the union since its inception. Is that true?

A. That is true.

Q. I believe you have testified that you were twice president of the union.

A. Yes, sir.

Q. And business agent for the union?

A. Yes, sir.

Q. And you are now and have been for how long secretary and treasurer of the union?

A. Since October 16, 1943.

(Testimony of William Parrish.)

Q. In your various capacities have you had occasion to observe the general course of conduct by the vendors, and the general course of conduct of the vendors in their selling operations?

A. I have.

Q. In your business have you become familiar, and do you know the practices of the wholesalers in their dealings with the individual vendors?

A. I do.

Q. Mr. Parrish, from your experience can you state that the testimony which you have given as to the relationship, where you answered that you were testifying for yourself, can you say of your own knowledge that the relationship and methods and manner of selling is substantially the same in the case [250] of other vendors?

Mr. Jacobs: An objection, your Honor. On cross-examination this witness testified, when I asked a question about supervision, control and all that, he said it was hearsay so far as he is concerned, and your Honor ruled out his answer because it was hearsay. This answer depends in its very nature upon pure hearsay.

The Court: Well, technically, that might possibly be true, but the witness is an officer of this organization and is familiar with the manner in which the members of the organization have conducted the affairs of the organization, conducted their affairs under this contract. He has stated that. The objection, I think, would be in respect to the weight and credence to be attached to the

(Testimony of William Parrish.)

testimony rather than the admissibility. I will overrule the objection.

A. That is a correct statement.

Q. (By Mr. Fink): Mr. Parrish, on cross-examination you were interrogated about strike votes. Do you recall the testimony in that connection? I don't want you to repeat it. Do you recall the interrogation upon that subject? A. Yes.

Q. Mr. Parrish, did the union at any time since its inception take a strike vote on Section 1 of the contract, or any contract? A. No.

Q. Did the union since its inception at any time take a strike [251] vote on Section 1 in conjunction with any other issue? A. No.

Q. Mr. Parrish——

Mr. Fink: And, if your Honor please, this question may be out of order or it may not——

Q. What is a strike vote in union procedure?

A. A strike vote is preparation for the membership to strike. It is the first step.

The Court: I think the witness covered that, Mr. Fink. As I recall his testimony he stated a strike vote was a proceeding whereby the membership gave authority to the officials to call the strike. Is that right?

A. Yes, sir, and it is also to give the committee a club over whoever they are negotiating with.

Q. (By Mr. Fink): And those strike votes when they come arise upon specific issues?

A. Yes.

(Testimony of William Parrish.)

Mr. Fink: That is all. Oh, I beg your pardon.

Q. Mr. Parrish, you were interrogated concerning a sales slip, and a sales slip was handed to you. Do you recall that exhibit, without getting it? I have a duplicate of it here. A. Yes.

Mr. Fink: That is a duplicate of the one in evidence.

Mr. Jacobs: Yes.

Q. (By Mr. Fink): Mr. Parrish, this sales slip is a duplicate [252] of the one in evidence.

A. Yes.

Q. I hand you another document, do you recognize that document?

A. Yes, it is a Chronicle sales slip.

Q. And is that a sales slip that was used by The Chronicle?

A. Yes, it was used I know in 1937, 1938, 1939 and 1940, and as far as I know it is used today.

Q. And did it precede in point of time the use of the other one I have just identified?

A. I never saw that other sales slip until it was shown to me on the stand.

Q. This is the one with which you are familiar?

A. That is the only type I have ever seen.

Mr. Fink: I would like, if your Honor please, to offer in evidence a copy of the sales slip identified by the witness, and ask that it be given the next consecutive number.

Mr. Jacobs: No objection.

(The document referred to was admitted in evidence as Plaintiff's Exhibit 50.)

(Testimony of William Parrish.)

Mr. Fink: May I have the negotiating committee's report, Mr. Clerk. It is one of the last exhibits.

Q. Referring to Defendant's Exhibit J, Mr. Parrish, I note in reading the transcript that the date is identified as October 1, 1937. Is that a correct date?

A. No, it had been corrected. It was August 1st.

Q. August 1st, 1937?

A. Yes, August 1st. It is in the one back there.

Mr. Fink: That is all.

Recross-Examination

By Mr. Jacobs:

Q. Mr. Parrish, do you know Deputy Attorney General Clarence Linn seated at this table?

A. I don't know his name. I met the gentleman once before.

Q. That was in 1944, was it not?

A. 1944? I was under the impression it was in 1943. It could have been 1944.

Q. You recall that you went to his office in the State Building in company of Mr. Spooner, did you not?

A. I accompanied Mr. Spooner to his office, yes.

Q. And Mr. Spooner is the local representative of the International Printing & Pressmens Union?

A. That is right.

Q. He was at that time, was he not?

A. Yes, and still is.

(Testimony of William Parrish.)

Q. Do you recall the purpose of that visit?

Mr. Fink: Now, just a minute. I object to that as being incompetent, irrelevant and immaterial, having no bearing upon the issues here, and being in point of time four years, or three years, as the case may be, beyond any date we are concerned with.

The Court: What is the purpose of the question?

Mr. Jacobs: I propose to show through this witness that he, in company with another gentleman, visited the office of Deputy Attorney Linn, and that they then represented to Mr. Linn that it was desired to take an opposite position than the union is now here taking, and indicated, I believe, [254] to Mr. Linn at that time that they considered themselves employees. Now, your Honor has stated that the conduct of the parties after the contract was executed——

The Court: Of course, what new arrangement they might want to make would be immaterial. You are seeking it as an admission?

Mr. Jacobs: An admission of the then existing contracts which are in evidence, they wanted to take a legal position.

The Court: I will overrule the objection, if that is the purpose.

Mr. Jacobs: May I state for the record——

The Court: Just ask him a question. You may answer the question if you remember the question. He wants to know the purpose of the visit?

(Testimony of William Parrish.)

A. Mr. Spooner asked if I would go along with him. He received instructions from the International to contact the Attorney General to obtain some sort of information. As I had nothing else to do, I went along with him as the International representative.

Q. (By Mr. Jacobs). You don't know what the purpose of that visit was?

A. As I recall it, and it is still firmly in my mind, it was to obtain some information on the situation in Los Angeles.

Q. You have no recollection of what transpired at that conversation?

A. It concerned the Los Angeles situation [255] altogether.

Q. You don't know why you went with him?

A. I went because the International representative requested me to.

Q. You went to keep him company?

A. That is it, if you wish to put it that way.

Q. Mr. Parrish, based upon your experience as a news vendor, as secretary and treasurer of the Union, and as business agent for the Union, is it not the fact that prior to August 31, 1937, the wholesalers, in delivering papers to street vendors, directed and controlled those vendors?

Mr. Fink: Just a minute. I object to that upon the ground that it has already been covered in the cross-examination.

The Court: I think you have covered that ground.

(Testimony of William Parrish.)

Mr. Jacobs: As I indicated, I thought the question was ruled out as far as hearsay before.

Mr. Fink: No, the period from April 1 to August 31, 1937, was covered quite in detail on cross-examination.

The Court: But you went into that. My memory may be faulty about it, but you did ask him concerning that period. You are asking how the parties were handled in that period?

Mr. Jacobs: I have read the transcript——

The Court: You may ask the question again if there is any doubt whether it was covered. [256]

Q. (By Mr. Jacobs): Do you understand the question?

A. Whether or not the wholesalers directed and controlled the vendors selling papers on the streets prior to 1937?

Q. Prior to August 1st, 1937.

A. Prior to that, there is no doubt about it.

Mr. Jacobs: No further questions.

Mr. Fink: No further questions.

The Witness: Thank you, Judge.

(Witness excused.)

Mr. Fink: If Your Honor please, at this time I desire to offer in evidence and read into the record, Treasury Regulations Nos. 90 and 91. I make that offer at this time.

Mr. Jacobs: May it please the Court, if Mr. Fink wants to introduce it I won't interfere, but I don't think it is necessary.

The Court: You can call attention to any regulation in the statute. There is no requirement that it be in evidence, is there?

Mr. Fink: If your Honor please, this is not a statute. This is a regulation adopted by the Treasury Department.

Mr. Jacobs: I will stipulate that these regulations are subject to judicial notice, the Treasury regulations.

The Court: They may be taken into account by the Court in consideration of the case.

Mr. Fink: I would prefer, your Honor, respectfully [257] disagreeing with the Court, I prefer to have them in evidence for another purpose.

The Court: All right. Let them be marked in evidence.

Mr. Fink: I will supply a copy of them. I would like to call the Court's attention to a part of each of the regulations.

In Regulation No. 90, reading only the first two sentences:

“Generally the relationship exists”—and this speaks of employment:

“Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who provides the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is accomplished. That is, an employee is sub-

ject to the will and control of the employer not only as to what shall be done but how it shall be done."

Further in the regulation:

"In general if an individual is subject to control and direction of another merely as to the result to be accomplished by the work, not as to the means and methods of accomplishing the result, he is an independent contractor, not an employee."

In Regulation No. 91, I want to read just the first sentence to the Court and I will supply the copies:

"The relationship between the person for whom such services are performed and the individual who performs such services must, as to those services, be the legal relationship of employer and employee."

Then there is a similar sentence defining an independent contractor, which I have heretofore read.

Mr. Casaday, please.

The Clerk: Do you have a copy you want marked?

Mr. Fink: I am going to supply them. Will you reserve two numbers, please, one will be Regulation No. 90, the first one, and the other No. 91.

The Court: They will be No. 51 and 52.

Mr. Jacobs: Mr. Fink need not supply them to the Government.

J. D. CASADAY

called as a witness on behalf of the Plaintiffs;
sworn.

The Clerk: State your name to the Court.

A. J. D. Casaday, C-a-s-a-d-a-y.

Direct Examination

By Mr. Fink:

Q. Mr. Casaday, what is your occupation?

A. Circulation manager for The San Francisco Examiner.

Q. How long have you been such?

A. About almost 13 years.

Q. Last past? A. I beg your pardon?

Q. 13 years last past, the last 13 years? [259]

A. The last 13 years.

Q. Mr. Casaday, what is your experience in the newspaper business?

A. Well, I have been connected with various newspapers all over the country. I have been with the Rocky Mountain News of Denver, the Denver Post, the Indianapolis Star, the Buffalo Times, the Los Angeles Examiner and the San Francisco Examiner.

Q. Always in the circulation department?

A. No, not necessarily. I have been with the circulation departments on all of these papers, but in various other departments also.

Q. And that newspaper work has been the major part of the work during your lifetime?

A. That is correct.

(Testimony of J. D. Casaday.)

Q. Now, Mr. Casaday, were you one of the publishers' representatives in the negotiations on all five of the contracts with which we are concerned here? A. I was.

Q. And you appear as a signer of several of them, do you? A. That is correct.

Q. In referring to the 1937 contract, those negotiations, it has been established, opened some time in the month of June? A. They did.

Q. Now, do you know what time the question of the relationship of the parties arose?

A. I do.

Q. Will you state when.

Mr. Jacobs: Objection. Go ahead, I withdraw the objection. [260]

A. Immediately.

Q. (By Mr. Fink): And I assume when you say immediately, you mean at the first meeting?

A. Yes.

Q. Was there an agreement upon the matter of relationship?

Mr. Jacobs: I object, your Honor. That subject was not only fully covered, but it is fully covered by the agreement in evidence.

The Court: Of course, whether an agreement was reached is best evidenced by the agreement. Isn't that true, Mr. Fink?

Mr. Fink: Your Honor, I can only repeat what I have said. I have presented a witness from the Vendors Union. Now I am presenting one of the publishers' representatives. There seems to be, and

(Testimony of J. D. Casaday.)

I think it was repeated this morning, some indication at least that this is not a true agreement; that there is something wrong with it. Now, I am attempting to show there was a meeting of the minds. I am trying to be brief with it.

The Court: You have already made out a prima facie showing, haven't you, that the parties dealt at arms' length and that as a result of discussion entered into this contract?

Mr. Fink: If your Honor please, would the Court think I had made a prima facie showing with the testimony of only one of the parties to the contract? I have one of the other parties to the contract now. [261]

The Court: Well, the Court would not have any objection to your producing evidence any way you want to. That particular question I think probably was objectionable. Can't you ask some general question of this witness that will cover the matter?

Mr. Fink: I will withdraw the question, and start again.

Q. Mr. Casaday, there was, without stating what it was, there was a discussion at this initial meeting as to the relationship? A. There was.

Q. And did that question thereafter arise during the course of the negotiations?

A. That is not quite clear to me.

The Court: I think what Mr. Fink wants to know is, did you have discussions concerning whether the news vendors should be independent contractors or employees.

(Testimony of J. D. Casaday.)

A. After the initial settlement?

The Court: At any time from the first time you started negotiations.

A. From the time we first started, we discussed it, that we would not deal on any basis but independent contractor relationship.

The Court: At first the Union was opposed to that. Is that right?

A. Not necessarily so. At first, as I recall, the initial proposition, it proposed an employee relationship; we refused to negotiate on that basis at any time. [262]

Q. (By Mr. Fink): And did the Union negotiating committee accept that basis of negotiation?

A. They did.

Q. Now, in the year 1938 there opened negotiations which culminated in the contract dated 1939. Did that issue arise at that time?

A. It did not.

Q. And to the contracts of 1940, 1942 and 1944, did that issue arise? A. It did not.

Q. Mr. Casaday, are you familiar with the manner and means of delivery of newspapers to the vendors? A. I am.

Q. How are they so delivered?

A. By means of what we term "wholesalers".

Q. And those wholesalers are your employees?

A. They are.

Q. Approximately how many are there in San Francisco, it is not very important, on The Examiner? A. On The Examiner?

(Testimony of J. D. Casaday.)

Q. Yes. A. About 40.

Q. Have you issued any instructions to those wholesalers respecting their dealings with the vendors?
A. I have.

Q. Were those instructions in writing?

A. They were not.

Q. How were the instructions communicated to the wholesalers?

A. Through their immediate superiors.

Q. And who would that be?

A. In our case?

Q. Yes.

A. Mr. B. J. Campbell on the night side, and Mr. Walter Schaefer on the morning side.

Q. Can you recite what those instructions were and are? [263]

Mr. Jacobs: May it please the Court, the instructions which are pertinent are the ones given to the vendors by their immediate superiors, not what instructions this witness may have given those superiors. That is the ground of the objection, that it is not material or relevant what instructions he gave to the immediate superiors of the vendors.

The Court: I will overrule the objection. The Court should hear the whole matter, I think.

Q. (By Mr. Fink): Have you got the question in mind?

A. I would appreciate it if you would restate the question.

(Question read by the Reporter.)

(Testimony of J. D. Casaday.)

A. My instructions to Mr. Campbell and Mr. Schaeffer, to be passed on to the wholesaler——

Mr. Jacobs: Mr. Casaday would you mind giving the date and point of time in this?

The Witness: I beg pardon?

Mr. Jacobs: Would you mind identifying this as to point of time?

The Court: I was about to say, does that cover the period 1937 to 1940?

A. Yes, sir. My instructions to these gentlemen was to pass along to the wholesalers to treat the vendors as independent contractors or merchants, and that they were to exercise no control over these news vendors.

Q. (By Mr. Fink): Did you give those instructions more than once? [264] A. Frequently.

Q. Do you know of your own knowledge whether or not those instructions were carried out by your subordinates?

A. May I answer that in my own way?

The Court: What do you mean by that? Was he present when the instructions were given? Is that what you are trying to bring out?

Mr. Fink: I will withdraw that question.

Q. Have you been present when those instructions were communicated to the wholesalers?

A. To the wholesalers?

Q. Yes. A. Yes, at various times.

Q. And you have heard those actual instructions given? A. To the wholesalers?

Q. Yes. A. Yes.

(Testimony of J. D. Casaday.)

Q. Have you any other employees of the San Francisco Examiner who contact the vendors other than the wholesalers? A. None.

Q. Then, so far as your department is concerned, is the news vendor free to offer his papers in any manner he sees fit? A. He is.

Q. Is the news vendor free to dispose of his papers as he sees fit?

Mr. Jacobs: An objection, your Honor. That is covered by your Honor's ruling on a previous witness' testimony, whether he is free to dispose of them as he sees fit. Your Honor, [265] I objected to that question when the same question was asked of the previous witness, on the ground that he was required to sell the newspapers under the terms of the contract.

The Court: I think that would call for a variation of the terms of the contract. We had that up before.

Mr. Fink: Yes, your Honor, we discussed it before. I recall that.

The Court: It is too general question to ask the witness for his conclusion.

Mr. Fink: Well, I thought I narrowed it. I don't want to argue it at length. I thought I narrowed it, showing that it is so far as his department is concerned. The point is, our position is there is a completed sale here.

The Court: Of course the contract really covers what you are asking the witness to give a conclusion about.

(Testimony of J. D. Casaday.)

Mr. Fink: Yes, Your Honor. May I elaborate a moment? A strict construction of the contract would indicate that the vendor would have to do one of two things, either he was to sell the papers or turn them in for credit. That is a contract provision. That is not what happens. What people do under a contract, how they themselves construe it, I believe is evidence.

The Court: Yes, that may well be, but I don't think the question, put the way you have put it, would cover that, because you are asking the witness to state a conclusion, [266] whether the man was free to do something or other. That, in turn, calls for an interpretation of the contract. You might ask him what actually happens.

Mr. Fink: I think your observation is accurate. I will withdraw the question.

Q. Do the news vendors dispose, to your knowledge, do the news vendors dispose of newspapers other than by way of sale or return for credit?

A. They do.

Q. And, of your own knowledge, can you state how they dispose of them, other than by sale or return for credit?

Mr. Jacobs: May the record show an objection to this whole line of testimony, as a variation of what is required under the contract? It is immaterial, the Government submits, whether they do those things in violation of the contract. The fact is, they are required in the contract to sell the papers.

(Testimony of J. D. Casaday.)

The Court: I will overrule the objection.

Mr. Fink: You may answer, under the ruling, Mr. Casaday.

A. May I have the question again?

(Question read by the Reporter.)

A. In some instances they dispose of papers from one vendor to another vendor.

Q. Anything else?

A. Naturally they buy papers themselves, particularly The Examiner.

Mr. Fink: He could not resist that plug, your Honor. [267]

Q. Do you maintain any payroll for the news vendors in your department?

A. I beg pardon?

Q. Do you maintain any payroll for the news vendors in your department?

A. We have no payrolls.

Q. Do you make any payments to the vendors, and confining the question to the period 1937 through 1940, do you make any payments to the news vendors other than as may be required under the guarantee provision of the contract?

A. We do not.

Q. Approximately how many vendors sell The San Francisco Examiner?

Mr. Jacobs: Can you give a date on that?

Mr. Fink: I will confine it to the period 1937 to 1940.

Q. Approximately how many vendors sold The San Francisco Examiner during that period?

A. Approximately 250.

(Testimony of J. D. Casaday.)

Q. I understand, Mr. Casaday, that The San Francisco Examiner operates with The San Francisco Chronicle what is known as a consolidated corner basis. Is that correct?

A. That is correct.

Q. And that is true of approximately all the corners in San Francisco?

A. You are speaking, are you, constantly speaking of 1937 to 1940?

Q. 1937 to 1940.

A. Mostly. There were at that time, as I recall it, approximately 12 or 15 what we term independent sales locations in the City.

Q. Out of the several hundred vendors?

A. Out of the [268] approximately 250.

Q. So far as the circulation department of The San Francisco Examiner is concerned, is the vendor free to circulate around the area of his corner?

Mr. Jacobs: An objection, your Honor. Again he is required under the terms of the contract——

Mr. Fink: I withdraw it voluntarily.

Q. Do you know of your own knowledge that vendors sell around the area of their own corners?

A. I do.

Q. Do they do that? Do they sell around the area of their own corners? A. They do.

Q. Have you in mind, Mr. Casaday, the number of vendors in the years 1937 to 1940 that made profits in excess of the guarantee?

A. You wish to know how many of the approximately 250 vendors made profits in excess of the guarantee?

(Testimony of J. D. Casaday.)

Q. That is right. Have you that figure?

A. During those years?

A. During the years 1937 to 1940. I would say approximately 220 to 225.

Q. Of the 250. Mr. Casaday, will you briefly, please, describe the operation of the guarantee provision of the contract? First, do you subdivide the operation of the guarantee provision of the contract between the papers? A. We do.

Q. And that is handled six months by The San Francisco Examiner and six months by The Chronicle?

A. You mean, each paper, each six months, reimburses the [269] vendors whose profits sold short of the guarantee?

Q. Yes. A. That is correct.

Q. And the papers, as between themselves, settle the balances, whatever they may be?

A. That is correct.

Q. Do you ever put vendors on a corner, or establish a corner that you know in advance will not make the guarantee? A. Have we done that?

Q. Yes, I say, did you, during this period 1937 to 1940 establish corners where you knew in advance the corner would not make the guarantee?

A. We do, or we did.

Q. And is there a circulation reason for that act? A. There is.

Q. Why do you establish corners when you know in advance you will have to make a payment under the guarantee provision of the contract?

A. A matter of service to the public.

(Testimony of J. D. Casaday.)

Q. And do you ever do it as a matter of competition? A. May I answer that?

The Court: He wants you to tell him.

A. Practically everything we do is a matter of competition.

Q. (By Mr. Fink): In other words, the newspaper business is one of the few competitive businesses? A. I think so.

Mr. Linn: I think that is calling for an economic interpretation.

The Court: I suppose that is true. I suppose the Court [270] won't close his eyes to the fact that San Francisco newspapers are in competition with each other.

Mr. Jacobs: I have no objection.

Q. (By Mr. Fink): Can you describe for the Court the manner of establishing corners in accordance with the provisions of the contract? How is that done, Mr. Casaday?

A. Well, corners, or sales locations have been established over a great many years. When these sales locations for any reason become vacant, it is a matter of common knowledge between the office and the News Vendors Union. The business manager of the News Vendors Union will call either the night or morning representative of the circulation department of The Examiner, stating that this sales location has become vacant, and offering at the same time a list of names of news vendors who might or might not be acceptable to the circulation department. Ultimately the business manager of

(Testimony of J. D. Casaday.)

the Union and the representative of the circulation department agree upon one of this list of members of the News Vendors Union who is available to cover this vacant sales location.

Q. And those vacant sales locations, or sales outlets, are checked how often, daily?

A. Might I ask what you mean by "checked"?

Q. Well, yes, I mean this, how often do you make a check to ascertain whether there are vacancies? [271]

A. There necessarily is not a check. When the wholesaler covers his district and the location is vacant, he will notify both the Union and the office.

Q. And from that you get the information to fill the vacancy? A. That is correct.

Q. Now, Mr. Casaday, does The San Francisco Examiner have a group-insurance plan, the group-insurance plan covering employees, life insurance?

A. Life insurance? They do.

Q. Are the news vendors included in that group, life insurance?

Mr. Jacobs: An objection, your Honor, to this whole line of questioning, whether they are treated as employees, in the life insurance plan, is incompetent and irrelevant, the Government submits, whether they treat them as employees or not, whether they are covered under the group insurance plan or not.

The Court: Why would it be?

Mr. Jacobs: May it please the Court, obviously the publishers are not going to recognize them as

(Testimony of J. D. Casaday.)

employees, cover them in a group insurance plan, if they had a contract that they were not employees.

The Court: What is wrong with that?

Mr. Jacobs: It is a self-serving statement. It does not prove anything.

The Court: I mean, I can contract any way I want to, may I not? [272]

Mr. Jacobs: The question is whether they were covered in a group insurance plan of employees.

The Court: Well, I must confess I don't see why that would be immaterial. The Court should hear all the evidence to show what the actual status of the news vendors is, in order to determine whether or not the statute is applicable.

Mr. Jacobs: Yes, your Honor. The ultimate question—I am not trying to exclude evidence from the Court—would be whether they are or are not insured under the group insurance plan of the publishers, does not prove or disprove, or add to or disprove to that question.

The Court: I will overrule the objection.

Mr. Fink: Have you the question in mind?

A. I think so, but I would appreciate hearing it again.

(Question read by the Reporter.)

A. They are not.

Q. Does The San Francisco Examiner, so far as you know, pay Social Security taxes on these vendors? A. They do not, not that I know.

Mr. Jacobs: Of course, if it please the Court, that is the issue before this Court.

(Testimony of J. D. Casaday.)

The Court: Whether they should pay, yes.

Mr. Jacobs: He cannot answer whether they should or not.

The Court: This was a tax paid under protest, was it not?

Mr. Fink: Yes, your Honor, paid under protest and a [273] claim for refund at the same time.

Q. Does your San Francisco Examiner pay under the Federal Unemployment Tax Act, or under the State system on these vendors?

A. They do not.

Q. Does The San Francisco Examiner have a vacation plan for employees? A. They have.

Q. Are vendors given a vacation with pay?

Mr. Jacobs: May the record show an objection to this whole line of testimony, as to how the vendors are compared in treatment with other employees.

The Court: Well, you may note the objection. It is very difficult to rule on an objection to a line of examination. If you are objecting to this question, I will overrule it.

A. They are not.

Q. (By Mr. Fink): Do you furnish vendors with transportation? A. We do not.

Q. Do you furnish them with any money which might be called an expense account or something of that sort? A. We certainly do not.

Q. Is the vendor free at all times to sell non-competitive articles?

Mr. Jacobs: Objected to as calling for a conclusion.

(Testimony of J. D. Casaday.)

The Court: Yes, the contract provides that can be done, as I recall it.

Q. (By Mr. Fink): Well, do the vendors in San Francisco sell [274] non-competitive articles?

Mr. Jacobs: An objection, on the ground of materiality, if your Honor please. Whether they do or not is immaterial, the Government submits.

The Court: I will overrule the objection.

A. They do.

Q. (By Mr. Fink): Do the vendors in San Francisco, to your knowledge, engage in activities—I will withdraw the question.

Q. Do the vendors engage in employment after they have finished their contract obligation?

The Court: I don't see the materiality of that.

Mr. Fink: All right, your Honor, I will withdraw it.

The Court: That would be true in any case. A man during a period that he is not bound to perform under another agreement, can do something else.

Mr. Fink: If your Honor please, I agree heartily, but may the record show that I am framing my question now on a State Government form. The State Government thinks it important. I agree with the Court heartily. I don't think it amounts to anything, but the Great State of California thinks it does.

Q. Mr. Casaday, is the vendor required to attend any meetings by The Examiner?

A. We do not have any meetings.

(Testimony of J. D. Casaday.)

Q. Therefore he is not required to attend any.

A. He is not required to attend any meetings.

Mr. Jacobs: Which they do not have.

Q. (By Mr. Fink): Do you exercise any control, or have any way of exercising control over the manner of the sale of the newspapers?

Mr. Jacobs: An objection, whether it is exercised.

The Court: I think you have covered that factually, Mr. Fink.

Q. (By Mr. Fink): Do you have anything to do with the matter of the vendors' collections from his customers? A. We have not.

Q. Have you any knowledge in your department of any credit relationship the vendor may have with his customers?

A. We have no knowledge of any such arrangements.

Q. Mr. Casaday, do you from time to time get from the public or other sources complaints against individual vendors? A. Occasionally.

Q. What do you mean by occasionally? How frequently? Just an approximation, how many would you have, say, in a period of a year?

A. Three or four.

Q. How are they handled when they come to you? A. They are referred to the Union.

Q. Did you do anything about it, as regards the individual vendor?

A. Our Mr. Campbell and Mr. Schaeffer discuss it with the business manager of the Union, and it is usually adjusted satisfactorily to everyone. [276]

(Testimony of J. D. Casaday.)

Q. Do you discharge the vendor?

A. We do not.

Q. Mr. Casaday, do you know of your own knowledge whether the vendors employ, themselves, employ substitutes?

Mr. Jacobs: An objection, on the ground of materiality and relevancy. The same question was asked the previous witness and ruled on. Whether they engage other employees, or not, is immaterial and irrelevant. Your Honor also ruled on the same question asked a previous witness.

The Court: I cannot say that I recall that.

Mr. Jacobs: The same question was asked of Mr. Parrish, if I recall correctly, and the same objection made, and the objection was sustained. I cannot refer to it at a moment's notice, but the same question was asked.

The Court: I don't see that it has any importance one way or the other. So far as this witness, I suppose it can be safely said that The Examiner or The Chronicle don't care particularly who sells papers, as long as they are sold.

Mr. Fink: If your Honor please, the question is directed to another point. The point involved is this: we wish to show that the vendor independently of anything the publisher knows, employs upon his own basis, makes his own arrangement, and from time to time employs other people. Now, we don't know anything about that.

The Court: Is there anything in the contract that prohibits that? [277]

(Testimony of J. D. Casaday.)

Mr. Fink: No, Your Honor, not a thing in the contract that prohibits that.

The Court: Is that right?

Mr. Jacobs: There is not anything in the contract that authorizes it.

The Court: The contract is silent. Is that right?

Mr. Jacobs: May it please the Court, I would not go so far as to say it is silent. This individual is engaged to sell the papers. Your Honor has the form of contract, John Jones engaged to sell papers under the terms of the Union contract, not to set up in business.

The Court: Well, if the contract does not prohibit it, I think I will allow the question.

Mr. Jacobs: If it please the Court, we want the record clear on that. We say the contract does prohibit it, in that the contract is for the vendor to sell the newspapers, the vendor individually.

The Court: Well, under your opponent's construction, he could still be an independent contractor and sell those papers. If he were an independent contractor, then there would be liberty of action to have someone else do part of his work, according to their contention. I think the evidence should go in for what it is worth. Didn't Mr. Parrish testify to that?

Mr. Fink: No, your Honor. This particular evidence has [278] gone in.

The Court: I will let it go in. Let the witness testify.

A. May I have the question?

(Testimony of J. D. Casaday.)

The Court: He wants to know if you know of your own knowledge that the news vendors have other men help them out selling papers.

A. Yes, to my knowledge, it used to be the practice for the vendors to have someone relieve them while they went to eat, or for other reasons that they might want to leave their sales locations temporarily.

Q. (By Mr. Fink): And they do from time to time leave their sales locations and put somebody else on the location? A. That is correct.

Q. And do you have any report in your office as to that activity?

A. We are not interested in it.

The Court: You get no report.

A. We get no report.

Q. (By Mr. Fink): Do you know who the substitute is who may be engaged by the individual vendor? A. We do not.

Q. Mr. Casaday, I hand you a mimeographed form, two mimeographed forms, one labeled at the upper left-hand corner "A. M." and then "P. M." Are those forms used by The San Francisco Examiner? A. They are.

Q. Mr. Casaday, we are interested, if you please, what is the distinction between the forms, the one labeled "A. M." and the one labeled "P. M."?

A. I did not get the question. [279]

Q. Why is one form labeled "A.M." and one form labeled "P.M."?

A. Because on our paper there is a distinction between the night side and the morning side for

(Testimony of J. D. Casaday.)

selling papers. The P.M. means sales that are the first edition up to around midnight. On the night side. The morning, A.M., is the sale of the final edition.

Mr. Fink: I seem to be having some trouble with these forms.

The Court: Before you get this straightened out, probably it is an appropriate time for the morning recess.

Mr. Fink: Thank you, your Honor. I am glad of the opportunity.

(Recess.)

Q. (By Mr. Fink): Mr. Casaday, to the two sheets which I handed you just before the recess, I have added a number of other sheets. What are those forms, please?

A. These are forms we used at one time to keep a tally of the sales records on the various locations in San Francisco.

Q. And that form is made up in your office?

A. It is.

Q. And what is the foundation in which the matter is transposed on to this form? Where do you get the information that goes on this form?

A. We required at times for the wholesalers to give us that information.

Mr. Fink: If your Honor please, I ask that this group of forms be introduced in evidence and be given an exhibit [280] number.

(Testimony of J. D. Casaday.)

Mr. Jacobs: No objection.

(The documents referred to were received in evidence as Plaintiff's Exhibit No. 53.)

Q. (By Mr. Fink): Now, Mr. Casaday, on this group of forms Exhibit No. 53 I note in the left-hand corner, or on the left-hand side of the page, there are designations by streets. What are those designations?

A. Those are designations of sales locations or corner where we sell The Examiner.

Q. Yes. And is that the method that you used in keeping track of the sales on the streets by the vendors?

A. Well, not necessarily. We use this in keeping track of our own records. We do not have a lot of the names of news vendors.

Mr. Jacobs: If your Honor please, the witness is going into a lot of things not responsive to the question, and I move that it be stricken. He was asked if that was the method by which they kept records. The answer obviously is no.

The Court: What is this sheet?

Q. (By Mr. Fink): Well, let's respond to the Court's question. What is the sheet, those sheets?

A. These sheets are a chart and listed on these sheets are the sales locations or corners in San Francisco, for the [281] purpose of telling us how many papers we sell at each location.

The Court: You keep a record on the sheet of how many you sell at each location?

(Testimony of J. D. Casaday.)

A. At times, not always. Whenever we want the information we keep it.

Q. (By Mr. Fink): And, Mr. Casaday, that form is written upon the basis of corners, rather than names of vendors? A. That is correct.

Q. Are any reports made to you by the vendors?

A. I lost that question.

Q. Are any reports made to you by the vendors?

A. No reports by the vendors.

Q. Does the vendor report in person to the circulation department of The Examiner?

A. They do not. Your Honor, may I qualify that?

The Court: The witness wants to qualify the answer.

Q. (By Mr. Fink): Go ahead.

A. In several instances there are news vendors that come to the alley to get their papers if they are situated right on the adjoining corner.

Q. But that is done by them for their own convenience? A. That is right.

Q. You would deliver the papers by your ordinary distribution system? A. We would.

Q. Mr. Casaday, in answer to a question of mine as regards [282] the 1938-1939 negotiations, I think you said that the question of the relationship did not arise. Do you recall how that negotiation started?

A. Well, I do not recall that that particular negotiation was any different than any other negotiation. The usual procedure is for the Union to

(Testimony of J. D. Casaday.)

submit us a proposal, and we, in turn, send them a counter-proposal, our counter-proposal in effect always has been the previous contract.

Q. And, in 1938 did you see any opening proposal of the Union? A. I did not.

Mr. Fink: You may cross-examine.

Cross-Examination

By Mr. Jacobs:

Q. Mr. Casaday, you stated 'that of your own knowledge you know that the vendors dispose of newspapers other than by selling them or returning them to the publisher. What is your source of information?

A. The source of the information I have in regard to the reply I gave to that question is reports that I get from my assistants.

Q. Then you don't know of your own knowledge, do you, Mr. Casaday?

A. Only to the extent of how far I rely on my operations.

Q. You have never seen a news vendor dispose of papers, have you, other than by selling or returning them? A. Personally? [283]

Q. Yes. A. No, I have not.

Q. You also stated, Mr. Casaday, that you know of your own knowledge that news vendors engage other persons to act as substitutes for them. What is the source of that information?

A. At times I have personally wandered around the streets of San Francisco, and I do know, I have known certain news vendors and their loca-

(Testimony of J. D. Casaday.)

tions, and even the nights they were supposed to be selling papers, and in passing these locations I have seen strangers selling the papers.

Q. How do you know, Mr. Casaday, whether the individuals you saw on the corners were not people who were engaged through the normal procedure, through the Union, for that night?

A. Because I have discussed it with the vendors.

Q. Then occasionally the news vendor has contacted somebody in the circulation department other than the wholesalers.

A. Not necessarily.

Q. I did not say whether it was necessary or not. Occasionally he does have those contacts with the head of the circulation department.

A. No.

Q. When you say you talked with news vendors on the corners——

A. Well, but that is not a business contact.

Q. What were you discussing, social life?

A. Yes.

Mr. Fink: I object to that as frivolous, and argumentative.

Mr. Jacobs: No, I mean the question seriously. He said it was not a business contact. [284]

The Court: Well, you are contending that this whole arrangement was a business contact?

Mr. Jacobs: No, but the witness stated on direct examination there was no contact other than with wholesalers, by the vendors. This witness now says he, himself, made contact.

(Testimony of J. D. Casaday.)

The Court: I think that is not much of a point, Counsel. The witness was merely responding to your inquiry as to how he happened to know that. He said he went around. It does not sound to me unreasonable that he would go around and talk to some of the news vendors and talk with some of the news vendors.

Mr. Jacobs: On the contrary, it would be very reasonable. I quite agree with your Honor. But it is quite unreasonable to say that nobody contacted the vendors other than the wholesalers.

Mr. Fink: Well, that is the fact.

The Court: I don't see what the question of contact has to do with it. Any business relationship, whether independent contractor, employment, anything else, bears a contact between the parties. That is not any point at issue. It is, What is the status?

Mr. Jacobs: May it please the Court, I did not raise this particular issue. Mr. Fink asked this witness; he made a point of it, whether anybody in the circulation department [285] contacted them.

The Court: Go ahead and answer the question. Is there still a question unanswered?

Mr. Jacobs: I will withdraw the question.

Q. Mr. Casaday, is it a fair statement to say that the function of circulation manager of your paper, your job, is to sell or to have as many San Francisco Examiners sold as possible?

A. Well, that usually is the function of a circulation manager.

(Testimony of J. D. Casaday.)

Q. Yes, that is quite obvious. That is your responsibility, is that right?

A. That is my responsibility.

Q. Now, who are your immediate subordinates in the circulation department?

A. You want me to name them all?

Q. Not necessarily by name, but by position. You have an assistant circulation manager?

A. Yes, we have an assistant circulation manager, a night circulation manager, a home delivery circulation manager, a news stand circulation manager, a suburban circulation manager, a country circulation manager, and an east-bay circulation manager.

Q. Do you have a street circulation manager?

A. No, we do not.

Q. Who in your circulation department is responsible for the delivery of papers to the vendors?

A. The wholesalers.

Q. And who are those responsible to?

A. I have already answered that question. Do you want me to answer it again? [286]

Q. You gave their names. I don't believe you gave their position or functions.

A. On the night side, the night circulation manager; on the morning side, it is the city circulation manager.

Q. The wholesalers are responsible directly to the night circulation manager and the day circulation manager?

A. And the city circulation manager.

(Testimony of J. D. Casaday.)

Q. With no intermediate superiors, is that right?

A. Several supervisors.

Q. What is the function of those supervisors?

A. They check out the papers to the wholesalers.

Q. Do they supervise the work of the wholesalers?

A. Not necessarily. It is more of a check-in and check-out job.

Q. How many supervisors are employed on the day side and the night side?

A. Would you mind qualifying that question to whether it refers to news vendors or the whole operation?

Q. I mean, to the news vendors.

A. We have one on the night side and one on the morning side.

Q. Now, is the supervisor's duty confined solely to the premises of the San Francisco Examiner?

A. In our case they are.

Q. He never goes outside the premises?

A. When you say "never," Mr. Jacobs, that would confine all of his work to the particular issue on hand, and that is not true. [287]

Q. I want to know what occasion there is for him to go outside, if there is an occasion.

A. Well, he might take a bundle over to the Greyhound Bus Station, when a bundle has been missed; he might go on an errand for me.

Q. Now, Mr. Casaday, the distribution of the street vendors' newspapers, to the street vendors, is divided into districts, is it not?

A. That is correct.

(Testimony of J. D. Casaday.)

Q. In the years 1937 to 1940, how many districts did you have?

A. I could not recall exactly.

Q. Can you recall approximately?

A. The operation changes completely.

Q. Would you say more than 50, or more than 15?

A. Between 1937 and 1940?

Q. Yes.

A. Oh, I would say about somewhere between 10 and 20 at that time.

Q. Between 10 and 20 districts. And to each one of these is assigned a wholesaler. Is that correct?

A. That is correct.

Q. Is there one wholesaler to each district on the day side, and one on the night side?

A. At times they overlap.

Q. But, normally, there is one wholesaler for each district on the day side, and one wholesaler for each district on the night side?

A. Normally.

Q. Mr. Casaday, occasionally during the years 1937 to 1940 The San Francisco Examiner employed new wholesalers. Is that [288] true?

A. 1937 to 1940?

Q. Yes.

A. Yes, occasionally we have employed new wholesalers ever since I have been there.

Q. Now, who instructs the new wholesaler upon his duties?

A. Well, the wholesalers are furnished by a drivers' union and they are supposed to be experi-

(Testimony of J. D. Casaday.)

enced and competent men, and they possibly get little instruction. The only instructions that are necessary to the operations we have, as I have mentioned a little while ago, are in regard to the relationship of the news vendors, the time of checking in and out, things of that kind.

Q. I ask you again, who instructs the wholesaler? A. Their immediate superior.

Q. The supervisor, is that correct?

A. No, the supervisors do not.

Q. You mean the night circulation manager?

A. The night circulation manager on the night side, and the city circulation manager on the morning side.

Q. The first time the wholesaler makes his delivery, the new wholesaler, is it not customary for an employee familiar with the district to take him around or drive around the district with him?

A. Not always. As I told you before, Mr. Jacobs, they are supposed to be competent and know the city, and they work from a route list.

Q. Have they always been competent? [289]

Mr. Fink: Oh, I object to that as incompetent and irrelevant.

The Court: Is there any importance to this?

Mr. Jacobs: I am trying to go into the relationship of the supervisors to the vendors and bring out that they must receive some instructions. The witness has evaded it so far.

Mr. Fink: I object to that statement, and it is not true.

(Testimony of J. D. Casaday.)

The Court: Well, I will ask you a question:

Q. What instructions do you ordinarily give to a man, a new man, who comes on as a wholesaler? What procedure does he go through?

A. Well, your Honor, may I say that the instruction would be according to how we felt, or the night circulation manager or the morning circulation manager felt as to his competency.

Q. If a man came along that the circulation manager knew had been doing that work before, he would not spend much time?

A. No instructions; give him a route list.

Q. Suppose the applicant was a newcomer, would there be anything particular the circulation manager would tell him?

A. In assigning a district to him he would give him the route list, ask if he was familiar with the district, if he could find his way around. He would explain the relationship with the news vendors, the method of collecting for the papers, how he had to turn in those collections, and any essential information necessary to the operation of a wholesaler.

Mr. Jacobs: Mark this for identification, please.

(The document referred to was marked Defendant's Exhibit O for Identification.)

Mr. Jacobs: I show you Defendant's Exhibit O for identification, and ask you if you have seen this document or one similar to it. That, I appreciate, is a photostat of an original.

A. I have never seen this personally.

(Testimony of J. D. Casaday.)

Mr. Fink: Pardon me, may I have the courtesy of seeing it, please?

Q. (By Mr. Jacobs): Mr. Casaday——

Mr. Fink: Just a moment, please. I would like to look at this document.

Mr. Jacobs: I have not asked a question on it, and I have not offered it in evidence.

Mr. Fink: You have had it marked for identification.

Mr. Jacobs: Is that any reason to interrupt the testimony, your Honor?

The Court: Well, let's not get all mad at one another about a little thing like that.

Q. (By Mr. Jacobs): Mr. Casaday, do the wholesalers receive instructions as to the obligations of the vendor under his contract?

A. I am sorry, I did not hear that, Mr. Jacobs.

Q. Do the wholesalers receive instructions as to the obligations [291] under the contract between the Publishers and the News Vendors Union?

A. The contract has been explained to the wholesalers.

Q. You explain to the wholesalers the sales period, when the vendors are expected to be on the corners. Is that correct?

A. The wholesaler knows what time they are supposed to be there.

Q. How does he know that?

A. Because it has been a practice that has been built up for a period of years.

(Testimony of J. D. Casaday.)

Q. And occasionally, when you get a new wholesaler, he has to be told, does he not?

A. He is told when vendors are supposed to be there on the entire district.

Q. Also he is told what to do in case a vendor is drunk on a corner, is he not.

A. Of course.

Q. Also he is told—what are his instructions in that regard? A. I beg pardon?

Q. What are his instructions in a case where he finds a vendor drunk on the corner?

A. His instructions are either to call in on the telephone verbally and make a report of it, or file a memorandum when he leaves his shift.

Q. Have you ever known, in the years 1937 to 1940, where a wholesaler checked out a news vendor before the end of the sales period because he was drunk?

A. Not to my personal knowledge.

Q. You have never heard of any vendor being checked in before [292] the end of the sales period because he was drunk? A. Not personally.

Q. Have you heard it through reports of your subordinates?

A. Well, if I had heard that, Mr. Jacobs, I would have heard it personally.

Q. Have you given instructions to wholesalers what to do in case a vendor fails to stay on the corner during the sales period?

A. That is a matter of complaint for the Union.

(Testimony of J. D. Casaday.)

Q. What are the instructions?

A. Explain that question, Mr. Jacobs.

Q. I ask you what instructions are given the wholesalers with respect to vendors who they find do not stay on the corners?

A. They make a report to the night circulation manager, or one of the circulation managers, and they take it up with the business agent of the Union.

Q. You spoke of a written memorandum made by the wholesalers. Was there ever a written form employed for the use of the wholesaler with respect to complaints about how vendors acted upon a corner?

A. There could have been without my knowing it. I don't see every form in the entire operation, Mr. Jacobs.

Q. In other words, every time a wholesaler is instructed to observe whether a vendor performs the obligations under the contract and to report it to the night side manager, or the City day side manager, is that right? [293]

Mr. Fink: I object to that as being unintelligible, at least to me.

Mr. Jacobs: I will reframe the question.

Q. In general the wholesalers are instructed to observe whether the news vendors perform their obligations under the contract and to report it to the night circulation manager or the day circulation manager. Is that correct?

A. No, that is not correct, Mr. Jacobs. They certainly are not instructed, and do not report

(Testimony of J. D. Casaday.)

every minor violation of a news vendor in regard to their individual contracts.

Q. What do they do? Do you forbid them to discuss violations with the vendors?

A. We do not forbid them to talk at any time.

Q. Don't you know, as a matter of fact, Mr. Casaday, that they do talk to the vendors, give warnings to the vendors, because of violations of the contract?

A. No, I do not know that, Mr. Jacobs. I do know they offer suggestions to the vendors at times.

Q. And what is the nature of those suggestions?

A. Well, Mr. Jacobs, that *certainly be* individual cases. I could not answer that question.

Q. Do they suggest to the vendors that they better perform the contract, about particular violations? A. They do not.

Q. What do you mean?

A. I mean if there was any way of assisting a news vendor, to help him increase his profits, and the wholesaler knew of something of that kind, I am sure he would make a suggestion to the news vendor.

Q. Can you give an example of such a suggestion? A. Not offhand.

Q. You don't know of any suggestions at all that have been made. A. Oh——

The Court: What is the materiality of this line of examination? I would like to know where we are going in order to follow the testimony.

(Testimony of J. D. Casaday.)

Mr. Jacobs: Those suggestions, as Mr. Casaday puts it, are nothing more nor less than instructions. I want to show the scope and the amount of suggestions given to the vendors by the wholesalers.

The Court: Well, does that enter into the suggestion as to whether or not they are employees?

Mr. Jacobs: Mr. Fink seems to think they have no contract with them. Mr. Fink thinks it is material.

The Court: But if it is true that they were independent contractors, they could have a relationship with them all the time, could they not?

Mr. Jacobs: Yes, your Honor, but may have the relationship of employees, and the nature of the advice and suggestions and orders given to employees and to independent contractors is different.

The Court: Well, if I have an independent contractor [295] dealing with me, I have a right to terminate that relationship, and I would have a right to say to you, "if you don't do it the way I suggest to you, I am going to terminate the relationship." That would not make an independent contractor an employee, would it?

Mr. Jacobs: No, your Honor, but if suggestions are continually given and threats of termination, I think that is tantamount to employment. If the wholesaler, say, suggested "Do thus and so," and the vendor is not amenable to those suggestions, they can terminate the relationship. I think that is equivalent to a right to order and fire.

(Testimony of J. D. Casaday.)

The Court: Would that make an employment contract if, in fact, it was an independent contractor? If there was a right to discontinue the relationship? I am trying to follow this line of examination. I am making this inquiry, "If there is an independent contractor relationship between you and me, which I can discontinue if I want to, the mere fact that I insist upon your following some suggestions, or I call your attention to some inefficient manner of your operation, would the fact that I did that convert your relationship into employment?"

Mr. Jacobs: No, your Honor, but the premise to your question still is whether an independent contract relationship exists. That is what the plaintiffs have to prove. And to prove this, they say that the suggestions are nothing more [296] than suggestions. I think the Court may well interpret that the suggestions are orders, ordinarily given by an employer to an employee. That is the purpose of the question.

The Court: Well, I think the issue is pretty narrow in this case. I think we have taken an awful lot of time on insignificant matters. After all, we are informed by the text book writers that this is a free country; a man can make any kind of contract he wants to; it is not for the security administration to tell anybody what kind of a contract he should make. The only question is whether or not he simply makes a contract and in fact they are doing something else than they agreed to, either

(Testimony of J. D. Casaday.)

for the purpose or having the effect of converting it into a different relationship, or a different status. So, I don't quite see. If there is, in fact, an independent contractor relationship, then the fact that there is conduct and suggestion, or even ultimatums from one party to another, would not change the relationship.

Mr. Jacobs: That is quite correct, your Honor, if the relationship exists, but that is the question before the Court.

The Court: I realize that.

Mr. Jacobs: And particularly if this Court is to determine from the evidence how the people behaved in their day to day working conditions as indicative of the relationship, we think suggestions and orders given to the vendors is quite definitely pertinent or material. Your Honor will examine all the evidence and see how they behaved with each other. It is obvious that persons in the relationship of independent contractors do not deport themselves in the same manner as employees or employers.

The Court: They don't.

Mr. Jacobs: Now, I mean, the employer says, "You do thus and so." With independent contractors, he cannot do that. Now, what Mr. Casaday calls "suggestions," that is an euphemistic term tantamount to nothing but an order, particularly when it spells out the rights of parties to other conditions in the contract.

The Court: You are getting closer to what I am getting at. Assuming it is an order, what has that got to do with it?

(Testimony of J. D. Casaday.)

Mr. Jacobs: It is one of the indications of an employment relationship.

The Court: Well, again you come back to the question I asked a minute ago. If you are an independent contractor, and building a building for me, and I have a right under our contract to discontinue your activities, and I tell you, "You put that beam up that way or I am going to get somebody else to do it," that would not make you my employee, would it?

Mr. Jacobs: No, your Honor, if I was in fact an independent contractor before.

The Court: But, the fact that I give you an order does not transform the independent contractor relationship into an [298] employee contact, merely because I do tell you to do something and as a penalty, I say I will take the contract away from you.

Mr. Jacobs: Normally an employer gives orders and instructions to an employee, depending upon the position.

The Court: I fully appreciate that. If you are under my direction, you have to work exactly the way I tell you to do it, and I control you at all stages of the work. That applies in the cases of an employer and employee relationship. But, that is a little different from the case of if, in fact, you were building a building for me as an independent contractor, I have the right to discontinue your activities at any time. The fact that I give you

(Testimony of J. D. Casaday.)

orders, or even directions, still that would not make an employer and employee relationship.

Mr. Jacobs: If it please the Court, this line of questioning as to whether instructions and orders was given, was opened by plaintiffs' counsel, not by me. They felt the matter was material to show that no orders were given. Your Honor accepted that.

The Court: Well, evidence of what they actually did is pertinent. Well, I am just trying to narrow the issue to see exactly what I have to decide. That is what prompted my question.

Mr. Jacobs: I also want the Court to understand the Government's position. Regardless of whether any instructions [299] or orders were given, under the terms of the Union agreement, the obligations of the vendor are such that an employment relationship must be construed as a matter of law.

The Court: Isn't this the situation in this case: I imagine most of the evidence is going to be cumulative. Isn't this question a mixed one of fact and law that is going to present itself? The newspaper publishers have a right, of course, to make an independent contract if they want to. It is no business of the security administration if they want to. You cannot say, "We want to collect some taxes, so you have to make an employee contract." There is no question about that.

Mr. Jacobs: That is right.

The Court: Now, they start out obviously attempting to create an independent contractor rela-

(Testimony of J. D. Casaday.)

tionship. Now, isn't the only question involved in this case, whether they succeeded in that or whether the course of conduct in some way indicates that has, in fact, become an employer-employee status?

Mr. Jacobs: I don't quite agree with everything your Honor said.

The Court: Is there some question of fact still involved in the first consideration mentioned, namely, that they did not start out to do that? That maybe it was fraudulent, or a conspiracy? [300]

Mr. Jacobs: No, your Honor. If you were to go to the motive, the motive in Clause 1 of the original agreement where it stated the relationship was not that of employer and employee, and you compare that with the other obligations of the vendor, it was the motive of the publishers to get from the vendors all the obligations that they would get with an employment relationship and at the same time avoid responsibility that goes with being an employer. That to me is evident. No employer wants to bear the responsibility of an employer, whether it be for taxes or what.

The Court: Was there anything wrong about doing that? If I want to make a contract with you and I don't want to be an employer, I want to avoid the responsibility, there is nothing in the law to prevent me.

Mr. Jacobs: But, you cannot have your cake and eat it too, to apply a homely phrase. We are getting into argument.

The Court: I appreciate that, but I just wanted to see.

(Testimony of J. D. Casaday.)

Mr. Jacobs: If I say to Mr. John Doe, "You will work where I tell you, when I tell you to work, under the conditions I tell you to work," regardless of what I say to him, let's assume it is ditch digging, "regardless of how I tell you to use your shovel, you are an employee." There is nothing I can say that can change that relationship, whether it is in writing or otherwise. I think there is nothing more eloquent, nothing more moving than the testimony of the plaintiff's [301] witness Mr. Parrish who says there is only one manner to sell newspapers. What does it mean when he says "I don't instruct you how to sell the newspapers." It does not mean a thing. No instructions are necessary, Mr. Parrish said so. Now every other aspect of employment relationship exists here. If it was not for that phrase, we submit at the outside there would not be any question to that, that the relationship was that of employer and employee, and these parties by contract cannot state, "Why, regardless of what we are, we want to be considered, so far as third parties are concerned, independent contractors." The newspapers did bind each other as to the relationship, but they cannot bind the Government and say, "Because we say we are independent contractors, it must be so." I want to make myself clear on that.

The Court: I have been kind of egging you on so you would state your position, because it helps me rule on the evidence.

(Testimony of J. D. Casaday.)

Mr. Jacobs: That is the reason, I submit to the Court, why we said this case could be decided on the motion, so far as the defendant is concerned. Plaintiffs wanted to put on evidence to show there was no control, that no instructions were given. I think with the showing at the time the witness said that no instructions were necessary, every other aspect of the relationship is spelled out in the contract, what they did with the product, where they work, when they work, that [302] is in the contract. The only thing, Mr. Fink belabored us that they have no right to exercise control, they cannot exercise control. This witness testified that they can work around the corner. I submit, your Honor, that if I, as a news man with the ability to work a 50 square foot area, it does not give me such discretion as makes me an independent contractor. There is not a single thing in the contract that makes them independent contractors.

The Court: Of course you can argue this later. I suppose the Court brought this on itself.

Mr. Linn: I suppose the critical language of Judge Cardoza in the New York case of *Guilmi vs. Netherlands Dairy Co.*, which was the case of a dairy route driver, who was quoted by the Connecticut Supreme Court in the case of *Jack-and-Jill vs. Tone*, probably sums it up:

“The salesman has no discretion as to the manner of performance, or none that is substantial. He travels a prescribed route from

(Testimony of J. D. Casaday.)

which he may not deviate. If he fails to work it diligently, he knows that there will be an end of his employment as surely as if he were working for a stated wage. On the one side there is an intimacy of control and on the other a fulness of submission that imports the presence of a 'sovereign,' as the master, we are reminded, was sometimes called in the old [303] books.—The contract is adroitly framed to suggest a different relation, but the difference is a semblance only, or so the triers of the facts might find."

The Court: In that case did the drivers have their own vehicles?

Mr. Linn: In the Jack-and-Jill case they had their own I think.

The Court: The Court said it was an employee?

Mr. Linn: Yes.

The Court: With their own wagon?

Mr. Linn: I think so. I am not positive on that. The Jack-and-Jill case is a recent case. The Judge Cordoza case is a very old case, when he was sitting on the Court of Appeals of New York. In other words, every element of control that could be used is spelled in the contract, except whether a man should use a bass voice or a tenor voice and nature took care of that.

Mr. Jacobs: Before the recess, may I put two things before the Court, and before I resume cross-examination, because if your Honor is of the opin-

(Testimony of J. D. Casaday.)

ion that you indicate, that the Government has a burden, if the Government has a burden, I think it should have a great latitude.

The Court: You can have all the latitude you want. What prompted my question was to see the materiality of that line of examination. [304]

Mr. Jacobs: Secondly, I want Your Honor, at this time to put in a brief of the Government and point out numerous cases in which there have been contracts between alleged independent contractors, in which they called themselves everything other than employer and employee, they called each other partners, lessors and lessees, and the court did not feel compelled by what they called themselves.

The Court: That was not what prompted my inquiry. I appreciate that it is not a question of what they call themselves; it is what relationship did they intend there, and having followed the action they decided, did they actually create it? That is the real question, isn't it?

Mr. Jacobs: It is, Your Honor.

The Court: Well, you are going to have an opportunity to present evidence in the matter.

Mr. Jacobs: Let me make that clear, Your Honor. It is very doubtful; we are depending almost entirely on the evidence elicited from this witness.

The Court: That is what I said at the beginning of this trial, I could not see that there could be much dispute as to the actual facts. As to how

this transaction was conducted, and I am sure it would become a matter of law. So far I cannot see there is very much that is subject to dispute.

Mr. Jacobs: I don't think so either.

The Court: We will recess until 2:00 o'clock.

(Adjourned to 2:00 p.m. this date.) [305]

Afternoon Session

Tuesday, April 2, 1946, 2 P.M.

Mr. Fink: If your Honor please, may I have the Court's permission to call a witness out of order, a purely formal witness to identify those photographs? That is the sole purpose.

The Court: Any objection?

Mr. Jacobs: No question but those photographs are genuine photographs. The record shows that. If he wants to call him——

Mr. Fink: I merely want to identify the corners that they were taken on. I have the witness here who will do that.

The Court: All right; put him on.

Mr. Fink: Mr. Snaer, will you take the stand, please?

SEYMOUR SNAER

called on behalf of the plaintiffs; sworn.

The Clerk: State your name to the court.

A. Seymour Snaer.

(Testimony of Seymour Snaer.)

Direct Examination

By Mr. Fink:

Q. Mr. Snaer, what is your occupation?

A. Photographer.

Q. For whom?

A. The San Francisco Examiner.

Q. Mr. Snaer, I hand you Plaintiffs' Exhibits No. 48-A to 48-H and ask you to examine them. I think they are numbered or lettered from the bottom up, Mr. Snaer. Did you take those [306] photographs? A. Yes, sir.

Q. Now, will you take them from the bottom up—I think it is 48-A; is that 48-A?

A. That is right.

Q. Now, will you identify the corner upon each one of these photographs were taken, please? They are all in the City of San Francisco, are they?

A. Yes, sir, this photograph——

Q. When you say "this," that doesn't mean anything.

A. 48-A was taken on the corner of Walnut—or, rather, I am trying to think. Chestnut and—I am trying to refresh my mind on that corner down there.

Q. Have you got a memorandum?

A. It is in the Marina. I neglected to bring it with me. I didn't know I was going to be called today on this. Maybe if I could just go on to some others and then come back to this——

(Testimony of Seymour Snaer.)

Q. Go ahead; identify them any way you wish.

A. This photograph was taken on the corner of Montgomery and Pine. This is No. 48-B.

48-C was taken on the corner of Grant Avenue and Market Street. 48-C.

48-D was taken on the corner of Grant Avenue and Sutter—well, rather, Grant Avenue and Geary.

Photograph 48-E was taken at the Terminal—San Francisco East Bay Terminal.

48-F was taken on the corner of Ellis and Powell.

And 48-G was taken on the corner of Third and Market. [307]

And 48-H was taken on the corner of Van Ness and Market. Right at the corner of Van Ness and Market.

And 48-A was taken on the corner of—in the Marina District; the street has slipped my mind.

Q. Is it Chestnut and Powell?

A. No, not Powell. Chestnut and——

Q. Fillmore? Chestnut and Fillmore?

A. No, it is about three blocks up from—Oh, Fillmore?

Mr. Jacobs: I will stipulate wherever it is——

A. Yes, I think it is.

The Court: It is taken in the Marina District?

A. Yes, that's right.

Q. (By Mr. Fink): On Chestnut Street?

A. Yes, that's right.

Mr. Fink: That is all.

(Testimony of Seymour Snaer.)

Cross-Examination

Q. (By Mr. Jacobs): Which of these photographs are taken in what could be called the main business section of San Francisco?

A. Well, I would say that most of them—most of them were taken in the main business section of San Francisco.

Q. Just for the record—everybody may know where these locations are—which of these photographs was taken outside of the main business district—which of these locations?

A. I think just one there, that one that I said I had trouble in finding the name—this one here, I would say, would be [308] the only one that would be out of the main district, that one there (indicating). All the others are in the business district.

Q. That is Plaintiff's Exhibit No. 48-A?

A. That is right. The others, they are all distributed around the area of business.

Q. Do I understand you correctly, all but 48-A are in the main business district of San Francisco?

A. That is what you would consider the main business district. I don't know how you could define it, but as far as my definition goes, they were all taken in the——

Mr. Jacobs: No further questions.

Mr. Fink: No further questions.

(Witness excused.)

Mr. Fink: Mr. Cassaday.

J. D. CASADAY

called for the plaintiffs, resumed the witness stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Jacobs:

Q. Mr. Casaday, before you get on the stand, will you get the Audit Bureau Circulation Reports?

Mr. Fink: I have them.

Q. (By Mr. Jacobs): Mr. Casaday, you stated on direct examination that in 1937 out of 225 corners or locations where the San Francisco Examiner was sold, on about 220 of them no [309] guaranty was paid. Now, from what source did you derive that information, Mr. Casaday?

A. I don't recall saying that, Mr. Jacobs.

Q. Do you recall your testimony as to the number of corners on which guaranties were paid in 1937?

A. I think so.

Q. Will you repeat that, then, please?

A. As I recall, my testimony was, out of about 250 corners——

Q. Yes.

A. ——that we made up the difference between the amount of guaranty and the amount of the profits on the sales on approximately fifteen to twenty-five corners. I think—that is, as I recall my testimony.

(Testimony of J. D. Casaday.)

Q. What is the source of your information for that statement? How do you recall the figure?

A. Well, the memorandum slip comes to me for approval for the payment of this difference between the profits and the guaranty on certain locations whereby the profits have not equaled the guaranty.

Q. How do you remember the number, approximately fifteen to twenty of them?

A. Well, as you say—as you just said, it is approximate.

Q. Yes. How did you know it was not fifty or a hundred?

A. How do I know?

Q. Yes.

A. Well, I have a pretty fair memory when it comes to O.K.ing anything paid out.

Q. Were any records kept of those corners on which the [310] guaranties were paid?

A. No, they were kept—there would be a memorandum at that time, but we haven't kept them because there was—to our knowledge, there was no material reason for keeping them.

Q. You recall the number of corners on which guaranties were paid, but you can't recall the number of wholesale districts in that period?

A. I told you approximately how many there were.

Q. Between ten to twenty?

A. That is right.

Q. They varied that much in 1937 to 1940?

A. It could.

(Testimony of J. D. Casaday.)

Q. Did it? A. Yes.

Q. It varied from ten to twenty in that period?

A. I said, "approximately," Mr. Jacobs.

Q. In 1937 do you know how many districts there were? A. In 1937?

Q. Yes. A. No, I don't.

Q. Do you remember in 1938? A. I do not.

Q. '39? A. Not in any individual year.

Mr. Fink: If your Honor please, let the record show that I am handing to counsel the Audit Bureau of Circulation Reports for the years 1937, 1938, 1939 and 1940. I will state to the Court that that is our only copy, as far as the Examiner is concerned.

Mr. Jacobs: Will you mark these four for identification; please? [311]

The Clerk: Defendant's Exhibits P, Q, R and S for identification. The year 1937 is marked P; '38 is Q; '39 is R, and '40 is S.

Q. (By Mr. Jacobs): Mr. Casaday, I show you Defendant's Exhibits for Identification P, Q, R and S, and ask you if you recognize them?

Mr. Fink: You don't have to identify those; they are admittedly Audit Bureau of Circulation Reports.

Mr. Jacobs: I want to examine this witness on the knowledge of the witness. May I be permitted to proceed?

The Witness: What is the question?

Q. (By Mr. Jacobs): Do you recognize those documents? A. I do.

(Testimony of J. D. Casaday.)

Q. What are they?

A. They are reports of the Audit Bureau of Circulation on these periods that they cover.

Q. Are these facts and figures shown in these reports taken from the books and records of the San Francisco Examiner? A. That is correct.

Q. And they are audited by the Audit Bureau of Circulation, are they not?

A. That is correct.

Q. Do you know what function these reports serve?

Mr. Fink: Objected to upon the ground that it is immaterial, irrelevant and incompetent.

Mr. Jacobs: May it please the Court, these reports cover all forms of circulation by this newspaper, all forms of [312] distribution, including sales by street vendors specifically. We think it is most vital, most material to the Court, to determine what part this particular form of distribution plays in the entire scheme of the Examiner over all circulation.

The Court: You mean what volume?

Mr. Jacobs: Volume and method. For instance, your Honor, this report gives——

The Court: Can't you agree to that? Why do we have to take up a lot of time with a lot of records?

Mr. Jacobs: We will introduce them in evidence.

The Court: Can't you agree as to what was the volume of business? Is that what you are trying to get at?

(Testimony of J. D. Casaday.)

Mr. Jacobs: These will be introduced in evidence, your Honor.

Mr. Fink: If your Honor please, I don't like to encumber the record. We have already got, I imagine, close to a hundred exhibits, haven't we? I imagine close to a hundred exhibits. Upon counsel's statement as to the purpose, I submit that my objection is good. We are here investigating a contract and the intent of the parties and the construction of the parties under a contract. Now, what part the circulation may have in interpreting that contract or in interpreting the construction the parties put on it, I can't see.

The Court: Counsel says he wants to show how much of the [313] circulation is attained through street corner vendors, is that it?

Mr. Jacobs: There are other facts in here. I could take up the time of the Court ad infinitum concerning the facts which we think pertinent in here such as percentage of returns. If the Examiner is in business simply to sell newspapers to the vendors, they are not concerned with returns, but these reports and this examination will bring out from this witness and show the percentage of returns through street vendors and other sources.

The Court: Unsold newspapers, you mean?

Mr. Jacobs: Yes. This is a complete statement of the manner in which the Examiner operates. I know of no easier way to explain it to the Court.

The Court: Let them be admitted, then. Do you wish to make an objection?

(Testimony of J. D. Casaday.)

Mr. Fink: I make the formal objection that they are incompetent, irrelevant and immaterial.

The Court: Very well. The objection will be overruled.

Mr. Jacobs: They are offered in evidence at this time.

The Court: They may be admitted.

(Thereupon the documents referred to were marked Defendant's Exhibits P, Q, R and S respectively, in evidence.)

Q. (By Mr. Jacobs): I asked you before, and you didn't have an opportunity to answer the question, Mr. Casaday, what [314] function these reports serve? A. What function these reports serve?

Q. Yes.

A. Why, they are intended to be a true report of the amount of circulation we have in the various branches of the circulation organization for the purpose of records that may be used for various things connected with the sale of advertising, the sale of the newspaper itself, et cetera.

Q. Advertisers look to this report to determine the net paid circulation of the paper at various points and through various means, is that correct?

A. I would say that is correct.

Q. Is it true also that the Audit Bureau of Circulation verifies and audits the figures furnished by the publisher, including the Examiner, to determine the accuracy of the figures? Is that correct?

A. Through the records kept by the Examiner.

(Testimony of J. D. Casaday.)

Q. Mr. Casaday, your papers are released in various editions. After a second edition is released, is the first edition readily salable?

A. I didn't get the last part of that question.

Q. The San Francisco Examiner is sold in various editions, is it not? A. It is.

Q. After the second edition is available for sale, is the first edition readily salable?

A. I don't know what you mean by "readily."

Q. Do people tend to buy the first edition when there is a later edition available? A. At times.

Q. In other words, you tell the Court that people normally buy older news?

A. Not necessarily. In my own case, in a great many instances it doesn't make any difference to me whether I get the first, second or third edition of a paper.

Q. Are you familiar with the reading habits of the public as they are concerned in buying papers?

A. That is right.

Q. What would you say their habits were in that respect?

A. I would say that the average reader—and I do say the average reader—would rather have the latest edition, but it doesn't always mean that the latest edition has later news in the paper than the previous edition.

Q. I didn't say it did. The tendency normally is to buy the later edition, isn't that so?

A. That is true.

(Testimony of J. D. Casaday.)

Q. Did you hear Mr. Bitler's testimony about the necessity of having papers available at specific times and places to make them salable?

A. I don't recall Mr. Bitler's testimony.

Q. Now, Mr. Casaday, in Defendant's Exhibits P. Q. R and S, I notice there is an item there of the amount sold through street vendors. Does that include the amount sold by the union vendors here?

A. May I see those? [316]

(Documents handed to the witness.)

A. (Continuing) Are you referring to this front page?

Q. Yes.

A. Their sales would be included in this figure.

Q. Mr. Casaday, isn't it true that also during the years 1937 to 1940 newspapers were sold on the streets of San Francisco through coin racks?

A. That is correct.

Q. Is it a relatively accurate description to describe those coin racks as a small metal box containing the name of the San Francisco Examiner, a place for a placard, and a place to drop the coin for the paper?

A. That would be a fairly accurate description.

Q. And those coin racks are the property of the San Francisco Examiner, are they not?

A. They are.

Q. And newspapers are placed in those racks by the wholesalers, are they not?

A. That is correct.

(Testimony of J. D. Casaday.)

Q. Can you tell me approximately how many coin racks there were used by the San Francisco Examiner for the sale of their papers in 1940?

A. In 1940?

Mr. Fink: Your Honor, I don't want it to appear that I have any objection to this line of questioning, except to question the relevancy or materiality of it. I have no actual objection, and if the Court deems it material I will keep quiet, but it seems to me we are going very far afield, and I interpose the purely formal objection that it is immaterial, [317] irrelevant and incompetent.

Mr. Jacobs: Recognizing the formality of counsel's objection, so there can be no doubt what the Government has in mind, these papers are sold through the coin racks by people who are admittedly employees of the publisher on the corners of streets in San Francisco by people admitted to be their employees, and we submit it is quite relevant to show that what they contend is a sale by independent contractors is also accomplished in the same way and under relatively the same circumstances by people who are admittedly their employees.

The Court: Well, you can bring out the facts and argue from that, I suppose.

Mr. Jacobs: I am stating the purpose to the Court to show that we are not wandering afield.

The Court: But I don't quite see the connection. What is the connection between the San Francisco Examiner or Chronicle owning some racks and through its own employees putting the papers on

(Testimony of J. D. Casaday.)

the racks in the public streets where a person wanting to buy one can put a coin in the box? What has that got to do with the status of the men who personally sell papers on the street corners?

Mr. Jacobs: The connection is this, may it please the Court: This corporation, Hearst Publications, is engaged in having the newspapers sold on the streets of San Francisco. [318] They are not interested—obviously not interested in selling to vendors; they couldn't get any advertising through that. I think that is argumentative, but it is a fact that they sell them through various means; they sell them through street vendors on the public streets, people whom they dispute are their employees. Now, on the same street corners, in some cases right alongside of them, you have a coin rack where the same papers are sold through men admittedly their employees.

The Court: No; they don't have any men selling the papers on the racks, do they?

Mr. Jacobs: They are serviced by the men, the wholesalers.

The Court: I don't see the connection, but you can bring it out. I suppose they deliver papers to news stands in hotels and all over. That would be similar and that would be another method of the distribution of newspapers. The fact that it is done some other way doesn't throw any light on this matter. I wouldn't think, but I would take it for granted that that is the fact. I see them all over San Francisco; everybody sees them; I don't think you have to——

(Testimony of J. D. Casaday.)

Mr. Jacobs: I would like to bring it out, what this Court may judicially notice within your own knowledge.

The Court: All right.

Have you any idea about how many of those racks there [319] are or were at the time?

A. Approximately.

Q. How many? A. A thousand.

Q. About a thousand in the years 1937 to 1940?

A. That is right.

Q. (By Mr. Jacobs): Isn't it true also, Mr. Casaday, that the wholesaler who places the paper in the racks makes the same amount per paper as the street vendor? A. No, it is not.

Q. Well, how much does the wholesaler who places the paper in the rack make per paper?

Mr. Fink: Just a minute. That is objected to as incompetent, immaterial and irrelevant.

Mr. Jacobs: It has been held by the authorities——

The Court: I will overrule that objection.

Q. (By Mr. Jacobs): How much does the wholesaler make per paper? A. No one knows.

Q. The papers are sold——

The Court: I don't think that the witness understood your question.

The Witness: Yes, I did, your Honor.

Mr. Jacobs: The amount per paper.

The Court: He wants to know what the man who puts the paper in the rack gets?

A. I understand. No one knows, because no one knows how much he collects from the rack. [320]

(Testimony of J. D. Casaday.)

Mr. Jacobs: The amount per paper, not the total.

A. I understand it would be the total, Mr. Jacobs, because he don't collect for each individual paper.

Q. I will put it this way: Papers are sold on the racks at the retail price of five cents marked on the rack, is it not? A. That is right.

Q. For every newspaper which is sold isn't there a specific amount which the wholesaler makes?

A. May I answer it correctly?

The Court: Yes, go ahead.

A. For every paper he sells and collects for he would make a certain amount.

Q. (By Mr. Jacobs): What is that certain amount?

A. If he collected for each paper that was taken from that rack he would make a cent and a half.

Q. A cent and a half. And that is slightly less than the news vendor gets? A. I beg pardon?

Q. That is slightly less—the news vendor gets two cents?

A. That is correct. Quite a substantial amount, I would say, Mr. Jacobs.

Mr. Fink: The difference is 25 percent, isn't it?

Mr. Jacobs: You can carry on the mathematics, Mr. Fink, as you please.

Q. Mr. Casaday, as I understand it, the wholesaler, when he makes his first delivery of the papers to the corner where [321] the vendor is supposed to be—let us assume that the vendor isn't there at

(Testimony of J. D. Casaday.)

the appointed time when the papers are dropped, what is the wholesaler expected to do about it?

A. I don't quite understand the question, Mr. Jacobs.

Q. In the event that the wholesaler, in making delivery of the papers to the corner, should find or fail to find that the vendor is not there during the sales period when he is supposed to be there, what is the wholesaler expected to do about it?

A. Use his own judgment.

Q. You are indifferent to what he does about it?

A. I beg pardon?

Q. You as circulation manager are indifferent to what he does about it?

A. It isn't a matter of being indifferent. Our wholesalers are fairly competent people, and they know what to do about it.

Q. What do they normally do about it?

A. I can't say what they normally do, because that would be a different practice with each individual wholesaler.

Q. Isn't it true that normally the wholesaler calls in to the circulation department and notifies them of that fact?

A. Not necessarily so. He may come back there later to see if the vendor has appeared up to that time.

Q. Let us assume that he finds the vendor there on his return trip, do you know what, if anything, the wholesaler would normally say to the vendor in case he was late in reporting there? [322]

(Testimony of J. D. Casaday.)

Mr. Fink: Just a moment, if your Honor please. Objected to as incompetent, irrelevant and immaterial, and asking for the state of mind of some third person.

The Court: Yes, I think it is very speculative. I will sustain the objection.

Q. (By Mr. Jacobs): Don't you know from reports or of your own personal knowledge that normally a wholesaler will make a suggestion to a vendor who was late on the corner?

A. Frankly, Mr. Jacobs, I wouldn't know what the wholesaler would say.

Q. You don't know whether they follow your instructions or not?

A. I didn't give any instructions with regard to that. I didn't say I did.

Q. You think that the wholesaler is free to allow the vendor to do as he pleases on the corner?

A. I didn't say that.

Q. What does he do? A. I don't know.

Q. Have you any instructions as to what he is supposed to do?

A. He uses his own judgment. That is what I told you. He knows what to do.

Q. You trust to his judgment implicitly?

A. As long as he is doing a good job.

Q. Have you ever had any reports of what they do? A. Personally, no. [323]

Q. What is required of a wholesaler to do a good job? A. Give good service.

Q. To whom? A. To everyone he serves.

(Testimony of J. D. Casaday.)

Q. How do you know whether he does that or not?

A. Well, we would ultimately receive complaints from one source or another, even up so far as the publisher.

Q. Have you ever received reports, Mr. Casaday, that the wholesalers frequently and wrongly tell the vendors what to do and what not to do?

A. I have not.

Q. What reports do you get on the activities of wholesalers?

Mr. Fink: On the activities of wholesalers, was that the question?

Mr. Jacobs: Yes.

Mr. *Jacobs*: Objected to as incompetent, irrelevant and immaterial.

The Court: I will overrule the objection.

Q. (By Mr. Jacobs): Will you answer the question, please?

A. What reports do I get on the activities of the wholesalers? Well, I might get a report that he was speeding recklessly down the street in the truck. I might get a report that he was haranguing with a streetcar motorman. I might get a report that he was late in delivering the papers to a certain news stand.

Q. Have you ever gotten reports of differences of opinion between the wholesaler and the news vendors? [324] A. I have not.

(Testimony of J. D. Casaday.)

Q. Have they always worked in perfect harmony?

A. I didn't say that, Mr. Jacobs. You asked me if I had had any report.

Q. Do you know whether they have always worked harmoniously?

A. I don't believe that they have always worked harmoniously, no.

Q. And what differences of opinion arise between them?

A. I couldn't answer that. There is too many differences of opinion could arise between any two people.

Q. You don't know of any specific differences?

A. I do not.

Q. Do I understand you correctly that when you open up a new corner you notify the union you would like to have a union member fill the corner, is that correct?

A. I didn't say that, Mr. Jacobs.

Q. What do you normally do when you open up a new corner?

A. It has been so long since we have opened up any new corners I wouldn't know.

Q. You don't remember ever having opened up a new corner, is that it?

A. Not in recent years.

Q. In 1937 to 1940?

A. Not even then we opened up any new corners in my memory. Please don't misunderstand me. I am not speaking of vacancies in established locations. You said new corners. [325]

(Testimony of J. D. Casaday.)

Q. Yes. When you are notified of a vacancy, let us say, by the wholesaler, that the corner is not filled, you normally call up the union officials, as I understand it, and ask them to supply a vendor, and they will name a list, is that correct?

A. That is correct.

Q. And you select somebody from that list?

A. From that list.

Q. There have been occasions, haven't there, when you have rejected people?

A. I beg your pardon?

Q. There have been occasions, have there not, when you have rejected suggested news vendors?

A. There have been occasions when we have rejected people on that list who we did not feel were even competent to stand up on these corners.

Q. What do you look for as to a satisfactory news vendor in determining their competency?

A. Well, somebody that can stand up and hold papers.

Q. Would it be fair to state that you expect them to be on the corner there during the sales period, to stay there on the corner and to be physically able to sell papers and take an interest in selling papers?

A. I think that would be extremely fair and reasonable to expect that.

Q. Let us assume that a vendor, by reports from wholesalers, indicates that he is deficient in one of those four qualities, [326] what is done about it?

A. He is deficient?

(Testimony of J. D. Casaday.)

Q. Yes.

A. The matter is taken up with the union.

Q. Does the wholesaler ever speak to the vendor about his deficiency?

A. I couldn't answer that, Mr. Jacobs, because I am not there at that time.

Q. You have never heard any reports of a wholesaler speaking to a vendor and suggesting that he improve his performance?

A. I would like to understand that question very clearly, if you don't mind.

Q. Have you ever heard of any case where a wholesaler has spoken to a vendor, let us assume, because he didn't stay on the corner during the sales period?

A. No, I haven't heard of any individual case.

Q. Have you heard of cases generally?

A. No. I might go so far as to say that I assume that our wholesalers offer constructive suggestions for the improvement and increase of sale of our newspaper.

Q. What sort of suggestions would they offer?

A. I think that is the question we left off on this morning.

Q. That's right; we are coming back to it in a different way.

A. All right. I would think that the wholesaler might suggest to the vendor that there is a show break at 10:20 and he might sell more papers if he covers that show break. I presume that he might suggest that if we had a good sales headline to be

(Testimony of J. D. Casaday.)

sure and display that headline so that prospective [327] buyers could see it.

Q. Would he suggest that he hold the paper out?

A. No, not necessarily. In most of these sales locations they have display racks that the vendors put their paper in there for display. On our paper, Mr. Jacobs, if you want me to give a report, almost entirely we are combined with our competitor in consolidated sales locations, and the vendors of their own free will and accord do not give preference to either paper by holding it out. If they have a sales rack at their location they will display both papers on these sales racks, and when the customer comes up he will ask, usually, for the Examiner, but whatever paper he wants.

Q. On appropriate occasion, would the wholesaler suggest to the news vendor that it would be to everybody's interest to stay more sober?

A. To stay more sober?

Q. Yes.

A. I couldn't answer that, but I don't think that would be too far out of line if the man was under the influence of liquor, that it would be for the public welfare that he stay sober.

Q. There have been cases for the welfare of the San Francisco Examiner that he would suggest that he state the headlines to the public?

A. That he state the headlines to the public?

Q. Yes.

A. Not for the San Francisco Examiner, because if he was selling both papers he would be stating [328] the headlines ordinarily of both papers.

(Testimony of J. D. Casaday.)

Q. Are your wholesalers concerned with sales of the San Francisco Chronicle?

A. Concerned with them?

Q. Yes. A. Oh, no.

The Court: Mr. Jacobs, if everybody who suggested to somebody else that they remain sober was thereby deemed to be an employer-employee basis, I think that would be getting into a very difficult situation.

Mr. Jacobs: I am sorry, your Honor; I shouldn't have treated the subject so lightly.

The Court: I don't see any importance to that.

Q. (By Mr. Jacobs): When you engage a vendor under a contract with a vendor to sell papers at a particular corner is it for an indefinite period, or a week or a month, or what is it?

A. Well, ordinarily, when a contract is given to a vendor for a particular corner, at first it is on a temporary basis, but normally it becomes a permanent sales location for that vendor if he——

Q. What is the temporary period?

A. Oh, approximately two or three days to a week.

Q. During that period the wholesaler observes the competency of the vendor?

A. I think not only the wholesaler, but the business manager of the union observes, you might say, the efficiency or the ability to stand up and hand out papers in return for nickels. [329]

Q. How does he judge that efficiency? By the number of papers sold? A. Not necessarily.

(Testimony of J. D. Casaday.)

Q. How does he judge it?

A. Well, more by his ability to stand up and be clean and courteous.

Q. The business manager goes out on the street and observes news vendors?

A. I think the business manager goes and observes the news vendors more than the wholesaler.

Q. Oh, you are talking about the business manager of the union? A. Yes.

Q. Is the San Francisco Examiner circulation department interested in the competency of the news vendor during the temporary period?

A. Of course.

Q. I ask you again, does the wholesaler observe that? A. I said he undoubtedly did.

Q. Does he report that to his superior with a recommendation that the man be retained or not be retained? A. I imagine he does.

Q. Isn't it also true that a wholesaler, from time to time, makes recommendations that a particular vendor be transferred to another corner?

A. No, I am afraid that isn't true.

Q. Let us say that an old corner becomes vacant and it is a lucrative corner and has got to be filled by someone, could the wholesaler recommend that an old vendor be given a more lucrative corner?

A. I think he could recommend, Mr. [330] Jacobs, but I don't think it would particularly carry any weight. That is usually arranged between the business manager of the union and either the night or morning circulation manager.

(Testimony of J. D. Casaday.)

Q. You have never made any independent selection of your own? A. I beg your pardon?

Q. Have you ever made any independent selection of your own from a news vendor already under contract?

A. Have we ever made any independent——

Q. Selection of your own?

A. No, it has been done jointly with the union. It is usually done in harmony, subject, Mr. Jacobs, of course, to the right of selection we have in the list that they submit to us, which is specifically stated in the contract.

Q. You spoke about these racks, Mr. Casaday, on which he displays the paper. Those racks are owned by the San Francisco Examiner?

The Court: He has testified to that. Let's not backtrack. I am willing to be very patient in this case, but I am not going to hear this story over and over again, about these racks. You are making a simple problem unnecessarily complex. I have heard the story now about the racks and the wholesalers and these men, now, over and over again for three days.

Q. (By Mr. Jacobs): Well, Mr. Casaday, when the wholesaler [331] receives a delivery from the supervisor of a number of papers on the first edition, is any record made of the amount he receives on that edition?

A. There is a memorandum made by the supervisor, because he has to collect from the wholesaler for those papers. There isn't necessarily any permanent record made of it.

(Testimony of J. D. Casaday.)

Q. No form record you use?

A. I beg pardon?

Q. Is there any printed or mimeographed form record?

A. Not to my knowledge, Mr. Jacobs.

Q. There wasn't any during the years 1937 to 1940?

A. I couldn't answer that truthfully. I don't recall just exactly what form of memorandum they would use. We didn't have anything for official records—necessary for official records, only by districts as a whole.

Mr. Jacobs: No further questions.

Redirect Examination

By Mr. Fink:

Q. Mr. Casaday, during your thirteen years' experience in San Francisco, have you had an opportunity to observe the operation of the other three newspapers in San Francisco?

A. To some extent.

Q. Are you acquainted with the circulation managers of the other three newspapers?

A. Past and present.

Q. Are you acquainted with them?

A. Yes, sir.

Q. Mr. Casaday, are you familiar with the street vendor [332] operation of the San Francisco Chronicle, the San Francisco Call-Bulletin, and the San Francisco News?

A. I am more familiar with the operations of the Chronicle than I am with the evening papers.

(Testimony of J. D. Casaday.)

Q. Well, now, confining yourself to the Chronicle, can you say of your own knowledge that the operation on the Chronicle, in so far as street vendors' sale, is substantially the same as you have testified to for the Examiner?

Mr. Jacobs: Your Honor, I don't think this witness is competent to give a general answer to specific questions which are only within the province and knowledge of the employees of the Chronicle.

The Court: Well, I suppose it might depend on hearsay unless he actually observed the system in operation.

Mr. Fink: Well, I thought I had qualified him. I will withdraw the question for the moment, if your Honor please.

Q. Have you observed the Chronicle's system of news vendor operation in San Francisco?

A. I have.

Q. And I understood you to testify that you had a consolidated position with them on nearly all the corners in San Francisco?

A. You mean by that, Mr. Fink, that one vendor offers both papers for sale?

Q. That is true.

A. That is almost entirely true.

Q. Mr. Casaday, now, repeating the question: From your experience and your own observation, and not hearsay, can you [333] say of your own knowledge that the operation of the Chronicle is substantially the same as that of the San Francisco Examiner?

(Testimony of J. D. Casaday.)

Mr. Jacobs: Same objection, your Honor.

The Court: I will allow the witness to testify to that to the extent of the consolidated operation, because I recall his earlier testimony, to the effect that there is an accounting operation, one on behalf of the other, for a six months period. So, to that extent, he would have sufficient familiarity to describe that operation, but so far as the Chronicle's operations on its own are concerned, I think the witness would not be qualified unless he actually participated in that.

Mr. Fink: Under the ruling of the Court, Mr. Casaday, you may answer the question, I take it.

A. It is almost identical from the time the papers leave the plant. In fact, your Honor, both wholesalers rode on one truck during the war.

Q. That was because of the O.D.T.?

A. The O.D.T. restrictions.

Q. Office of Defense Transportation. That was after the period we are interested in.

Now, Mr. Casaday, just one more question: Do you or any of your subordinates have anything to do with the disciplining of news vendors, whatever that discipline may be? [334]

Mr. Jacobs: The question has been asked and answered at least three times.

Mr. Fink: Not of this witness at all. And it was brought out by your cross-examination.

The Court: Would you read that?

(The reporter read the question.)

(Testimony of J. D. Casaday.)

The Court: I think the question is objectionable, whether they have anything to do. You can ask him whether they did anything.

Mr. Fink: I will change the form of the question.

Q. Do you, Mr. Casaday, or any of your subordinates, take any action in the disciplining of news vendors?

A. Nothing other than cancellation of the contract.

Q. (By Mr. Jacobs): Mr. Casaday, isn't it the practice——

Mr. Fink: I beg your pardon. Wasn't I redirecting?

Mr. Jacobs: I thought you were complete.

Mr. Fink: Go ahead.

Mr. Jacobs: No, no.

Mr. Fink: Go ahead.

The Court: Have you any further questions?

Mr. Fink: No, your Honor.

The Court: All right.

Mr. Jacobs: I thought I understood you to say you had finished, Mr. Fink.

Mr. Fink: Go ahead, Mr. Jacobs. [335]

Recross-Examination

By Mr. Jacobs:

Q. Mr. Casaday, isn't it the practice, and isn't it true that under your contract with the union, there is an employee of the circulation department who deals with the business agent of the union?

A. Let's see if I understand that question correctly, please.

(Testimony of J. D. Casaday.)

Q. I will read the portion of the contract to you if you don't recall it. Are you familiar with that portion of the contract which deals with the appointment or the designation of an employee of the circulation department who is to act as the representative with the business agent of the union?

A. I have told you that and who they were.

Q. Isn't it true when it is brought to that person's attention some deficiency or delinquency of the news vendor, that he communicates that to the business agent of the union?

A. Again, I want to make sure that I understand the question. You want to know that if one of my subordinates, who is in charge of the wholesalers, for instance, receives some notice of a delinquency or a failure of a news vendor to live up to the terms of his contract, if he calls that to the attention of the business manager of the union?

Q. Yes. A. That is correct.

Q. Don't you know of your own knowledge that normally the union member is disciplined by the union? A. By the union. [336]

Q. Following such communication?

A. That is correct.

Mr. Jacobs: No further questions.

The Court: All right. That is all. You have some more questions?

Mr. Fink: No, your Honor.

The Court: That is all, sir.

Mr. Fink: If your Honor please, may I ask the Court to read Section 12 of the 1937 contract? The reason I raise the issue at this time is because of the interrogation on racks by counsel in cross-examination. The import of his questions would indicate, although I do not know, of course, but would indicate that counsel has never read Section 12 of the 1937 contract.

The Court: Well, who is the next witness now?

Mr. Fink: If your Honor please, I have in court an Examiner wholesaler. I have in court a representative of the San Francisco Call-Bulletin. I have in court the circulation manager and another employee of the San Francisco Examiner. I have in court several members of the News Vendors Union. I am prepared to proceed to put those witnesses on the stand one by one.

I now represent to the Court that if I put these separate witnesses on the stand that they will testify to substantially all of the facts already covered by Messrs. Bitler, Parrish and Casaday. I represent to the Court that there [337] will be no substantial variation, and if there is any variation, it will be only as to minor details in no way affecting the main issue, and I now tender to the Government a stipulation to the general effect that if I place the witnesses upon the stand for the other papers as indicated by me, their testimony will be substantially the same as that already given, by the witnesses called.

Mr. Jacobs: May it please the Court, in response to the tender, I have no desire to prolong this trial

any longer—one moment more than is absolutely necessary, and I suggested at the opening of today's proceedings that we would give serious consideration to such a tender if members of the Chronicle, employees of the Chronicle, were called. I made that suggestion because I can't tell counsel for the plaintiffs how to put in their case. That suggestion was not taken up.

Maybe Mr. Fink doesn't think there is any substantial difference, but I know from my own knowledge that there are differences in operation, and certainly in the case of the Chronicle, and therefore I cannot accept the tender.

Mr. Fink: Well, now, your Honor, of course that is a direct refusal of the stipulation, and we can do no more; but I don't want to be charged by the Court with producing purely cumulative witnesses.

The Court: If you consider the evidence is cumulative, [338] there is no occasion for you putting it on.

Mr. Fink: If your Honor please, I must, because there are other papers involved. You see, these rulings——

The Court: There is only the Chronicle and Examiner involved in this.

Mr. Fink: No, your Honor. The Chronicle, the Examiner and the Call-Bulletin. There are three papers involved here. There are two others to be heard. The rulings in the three cases are identical; that is, the rulings from the Treasury Department are identical. I am perfectly willing to proceed, I

am prepared to proceed, but I represent to you seriously that you are going to be irritated by a lot of cumulative testimony that there will be no substantial——

The Court: I hope I haven't given the impression that I am going to be irritated by it. I just feel in the case of this kind that the case should have been presented in great part on a statement of facts, saving the time of Court and counsel, and the witness and everyone else concerned, that is all. I don't see any occasion for making a cause celebre of this case. It just involves a question of whether the street vendors are employees in fact, whether they come within the purview of the Security Act. There is no need of making a battle between the Government counsel and the newspaper publishers over it.

While every cause is important to those involved, it isn't [339] that important.

Has the Government any contrary testimony to offer in connection with the matter of the Examiner case? Oh, well, perhaps I should ask, have you any further testimony that you consider essential to the Examiner case?

Mr. Fink: I have one other witness here, a wholesaler, prepared to testify.

The Court: That would only be cumulative as to the Examiner?

Mr. Fink: Absolutely.

The Court: Maybe it might be well to direct the order of proof. Does the Government wish to

put on any testimony with respect to the claim of the Examiner in this consolidated action?

Mr. Jacobs: You mean in the defendant's case?

The Court: As a part of the defendant's case, yes. I am not urging you to either present or not to present any testimony. It just occurred to me, just in the interest of fairness and justice, that what is really involved in this case is an interpretation of the acts and the conduct and the agreements of the parties, and that there can't be a great deal of dispute as to these more or less notorious facts that are concerned with the transactions in question, and both sides should have ample opportunity to either brief or argue in any way they want, the interpretation to be put upon those [340] facts. My only complaint with this case is not with the issue particularly, but that I think it can be presented much better by way of argument than by taking up all the time, the hours of the Court's time, to describe how newspapers are sold on the streets in San Francisco. That could have been done in a written statement or by stipulation that could have been prepared before trial, and there can't be very much question about it. That is the only point that I have. I therefore don't want you to think that I am urging that you either do or do not present any evidence, Mr. Jacobs. I want to hear from you and your opponent fully on the important part or question at issue, and that is, what is the interpretation to be put upon the acts and conduct of the parties in order to show what their status is?

Mr. Jacobs: That is why I, in all good faith, suggested that they put on employees of the Chronicle.

The Court: Well, will that make very much substantial difference so far as the ultimate question is involved?

Mr. Jacobs: May I make a suggestion: that an appropriate employee of the Chronicle be called and that the Government be allowed to cross-examine him with respect to their practice?

The Court: Would you have any objection to that?

Mr. Fink: None whatever, your Honor.

The Court: All right. [341]

Mr. Jacobs: It is understood this is plaintiff's witness.

Mr. Fink: Well, now, after all, I am tendering a stipulation with the idea——

The Court: You can put him on as an adverse witness, under the rules, in your case; you are not bound by his testimony under the rule, so that wouldn't make any difference.

Mr. Jacobs: With that understanding, we will call Mr. Nichols.

Mr. Fink: Your Honor, may I suggest that we take a recess at this time?

The Court: Very well. We will take the afternoon recess, at this time.

(Recess.)

Mr. Jacobs: Do I understand correctly that plaintiff has not rested, and that this witness is simply being called out of order?

The Court: I understood from Mr. Fink that he has concluded his evidence so far as the Examiner is concerned. Is that right?

Mr. Fink: With one exception, your Honor. I told the Court that I had a wholesaler here, but if I put him on the stand his testimony would be entirely cumulative. I have a wholesaler in court prepared to testify. I am prepared to examine him, but his testimony will be entirely cumulative. [342]

The Court: Then there is no point in putting him on.

Mr. Fink: As I see it, your Honor, that is true.

Mr. Jacobs: If it is cumulative, there is nothing required of me.

Mr. Fink: Your Honor, the point to this colloquy is this: If I do not get a stipulation from counsel, then I assume it will be necessary for me to put these witnesses on the stand for a limited examination, anyway. I assume that counsel has in the back of his mind, although I don't know—I assume that he is going to contend that there is variation between the operation of the three newspapers I am representing here. If that be true, I will have to call the witnesses, which I dislike doing.

The Court: Well, is there any way that you gentlemen can suggest that the matter be shortened?

Mr. Jacobs: May it please the Court, let's clarify this one thing. As I understand it, this wholesaler of the Examiner would only supplement or repeat what Mr. Casaday or Mr. Parrish has said.

The Court: That is what Mr. Fink has said.

Mr. Jacobs: There is no occasion for any stipulation. I am not going to stipulate that that would be cumulative evidence. There is no necessity for any such stipulation as to the Examiner. Mr. Fink has stated that he has evidence, that he could call another witness who will repeat the same [343] testimony. He can use his own judgment as to whether he wants to put that cumulative testimony in as to the Examiner.

The Court: If the testimony is to be purely cumulative, I will say, then, that the Court would say that it doesn't want to hear the testimony of witnesses on cumulative matters, and that if any question were raised, if, in the course of the defense, the weight of the testimony were attacked, that the Court would then permit counsel to put his witness on to testify cumulatively. With that understanding, is it satisfactory?

Mr. Fink: With that understanding, I will accede to counsel's request.

Mr. Nichols, will you take the stand, please?

VERN L. NICHOLS

called as a witness for the plaintiffs; sworn.

The Clerk: State your name to the Court?

A. Vern L. Nichols.

Direct Examination

By Mr. Fink:

Q. Mr. Nichols, what is your occupation?

A. I am circulation office manager for the San Francisco Chronicle.

Q. How long have you been such?

A. Since about the first part of 1939.

Q. Mr. Nichols, have you been continuously in court since this case started?

A. Yes, I have, sir. [344]

Q. In so far as any part of the operation comes under your supervision in the Chronicle, would your testimony be substantially similar to that already given?

Mr. Jacobs: Just a moment, Mr. Nichols, unless we know what testimony——

Mr. Fink: After he answers that, I am going to turn him over to you and you can cross examine him.

Mr. Jacobs: May the record show an objection to the form of that question?

The Court: If the Court may make a suggestion—I am only doing it in the interest of time in a matter that may or may not be controversial; I don't want to affect the rights of either side—suppose you ask the question whether or not the

(Testimony of Vern L. Nichols.)

the manner in which the Chronicle handles its relation with the news corner vendors is substantially the same as that testified to by the witnesses on behalf of the Examiner. If he answers the question in the affirmative, then let counsel go into it.

Mr. Fink: I will adopt the question of the Court as my own.

Q. Do you remember the question, Mr. Nichols?

A. Yes, I do.

Q. Will you answer it please?

A. I would say yes, in most all the testimony that has been given that the routine in relation to the carrying on is about the same as has been [345] mentioned in the other testimony.

Mr. Fink: You may cross-examine.

Cross-Examination

By Mr. Jacobs:

Q. Mr. Nichols, does the Chronicle keep a record of the vendors to whom they paid a bonus or guaranty?

A. Yes, we keep a record week by week.

Q. How far back do your records go? Or to refresh your recollection, I recall that they go back to 1943, is that correct?

A. Part of our records, yes.

Mr. Fink: To 1943? Is that what you said?

Q. (By Mr. Jacobs): Is that correct?

A. Part of our records, yes. I wouldn't say all of them were complete.

(Testimony of Vern L. Nichols.)

Q. No, but there are some records as far back as March, 1943, is that correct?

A. Yes, there are some.

Q. Before that date have they been destroyed?

A. Yes.

Q. For business purposes? A. Yes.

Q. They were no longer useful.

A. No use for them.

Q. Can you, through any other representative of the Chronicle, obtain for me the record, in order to shorten this proceeding, the record of the amount of guaranties or bonuses paid to vendors of the Chronicle for the weeks March 21st, March 28th, April 4th, and April 18th, 1943?

Mr. Fink: If your Honor please, that is objected to as [346] being without the period under investigation here. We are investigating a period that begins August 31, 1937, or April 1, 1937, and that ends in 1940.

Mr. Jacobs: May it please the Court, I have established by this witness that there were no records available during the taxable period. I will say, though, it is quite relevant, in the absence of such records, to show how they operated from the earliest time that they have records under the contracts, which are substantially the same, and which the plaintiffs contend are substantially the same.

The Court: As a preliminary matter, I think you could go into that in order to ascertain whether or not in the period in issue they similarly conducted themselves. I would allow it for that purpose.

(Testimony of Vern L. Nichols.)

Q. (By Mr. Jacobs): Were similar records kept during the period April 1, 1937, through 1940?

A. No, I don't have the records complete, Mr. Jacobs. We came across some records, like corner complaints, and some correspondence, I believe, but I have no records of the exact amount paid out to vendors during '43 or any month such as that——

Q. You have no record now, but were such records kept? A. Yes, sir.

Q. Were the same sort of records kept for 1943 as were kept from 1937 to 1940?

A. Very similar, yes. They [347] have been changed slightly.

Q. Again I ask, Mr. Nichols, can you obtain the record of payments on guaranties during the four weeks I mentioned?

A. No, I cannot, Mr. Jacobs. I don't have those records.

Q. Not in the courtroom. Can you obtain them through some employee?

A. No, I have no amounts that were paid to vendors during 1943 for those weeks you mentioned.

Q. Mr. Nichols, did you receive a subpoena to produce the corner guaranties—amounts paid on corner guaranties?

A. Yes, the records for '37, '38, '39 and '40, but those records are not available.

Q. Did the subpoena you received specify those years? Mr. Nichols, I read you what purports to be a copy of the memorandum of subpoena directed to you: "Bring with you all reports, records and

(Testimony of Vern L. Nichols.)

forms of reports and records, and other writings relative to the amount of sales of the San Francisco Chronicle by street vendors by reason of contracts with the news vendors, and all records, reports and writings relative to the agreement, conditions and such other amounts as may have been paid to said news vendors."

A. The sale to the vendors is shown up in the audit reports during that period.

Q. This subpoena directed you to bring the records of the amount paid for corner guaranties.

A. I don't have any records. [348]

Mr. Fink: Just a moment. I object to that upon the ground that it is argumentative, if your Honor please.

The Court: The witness has answered that he has no such records.

Mr. Fink: That is right.

Q. (By Mr. Jacobs): Mr. Nichols, do you recall my visit to your office? A. Yes, sir.

Q. Do you recall showing me the records of corner guaranties? A. Not for 1943.

Q. What was the earliest period for which you showed me the records?

A. I think I just showed you some for the current month of March.

Q. How far back? You said a moment ago your records go back as far as 1943.

A. In some instances, yes. Our records are not complete in its entirety of any dealings with the news vendors.

(Testimony of Vern L. Nichols.)

Q. Will you produce them——

Mr. Jacobs: I ask the Court, if necessary, to direct the witness to produce them for the earliest period you have.

A. I will look again, Mr. Jacobs, and see if I can find records extending back that far. But may I answer it this way, your Honor, by saying that after a year we feel that they are of no value to us and we can't—if we stored everything pertaining to news vendors we would have to hire a hall to store them in, it takes up such a great volume of space. [349]

Q. Didn't you show me a complete box of records on vendors' corner guaranties?

A. Yes, I believe I did.

Q. Where is that box?

A. It is still down there. I don't—if that was 1943, then I have made an error, for which I am sorry.

Q. That may be. I don't say you misstated it. Will you get that box, please, or have somebody get it for you? A. Yes.

Q. Not at this time. I want to ask you a few more questions.

Mr. Jacobs: Will you mark these for identification, please?

The Clerk: These will be marked Defendant's Exhibits T, U, V and W. T is 1937, U 1938, V 1939 and W 1940.

Q. (By Mr. Jacobs): Mr. Nichols, I show you Defendant's Exhibits T, U, V and W for Identifi-

(Testimony of Vern L. Nichols.)

cation, and ask you if you recognize them, and if you recognize them, state what they are?

A. Yes, sir, these are the Audit Bureau of Circulation Annual Reports covering the years 1937, '38, '39 and '40.

The Court: That is for the San Francisco Chronicle?

A. San Francisco Chronicle; I am sorry.

Mr. Jacobs: They are offered in evidence.

The Court: All right. Let them be admitted.

Mr. Fink: I present the formal objection, your Honor, that they are incompetent, immaterial and irrelevant. You have already ruled on it. [350]

The Court: I presume that they are offered for the same purposes as similar documents in the case of the Examiner. Therefore, they will be admitted for the same purpose.

(Thereupon the documents referred to were marked Defendant's Exhibits T, U, V and W respectively, in evidence.)

Mr. Jacobs: Will you mark this for identification, please?

The Clerk: Defendant's Exhibit X for identification.

Q. (By Mr. Jacobs): I show you Defendant's Exhibit X for Identification, and ask you if you recognize it, and if you do, state what it is?

A. This is a report showing the street sales of the San Francisco Chronicle.

(Testimony of Vern L. Nichols.)

Q. Was this form or a form containing the same information in use during the years 1937 to 1940?

A. It may have been slightly changed; it is practically the same.

Q. Is it true that on this form is recorded the amount delivered on each edition to each district?

A. No, not—It was set up for that purpose, however, but they don't always use the breakdown on each edition; it is generally the total amount of papers they received in one evening—one day's issue, rather.

Q. Is that the practice now or was that the practice in 1937?

A. This is the practice now and was then also.

Mr. Jacobs: I offer defendant's Exhibit X in evidence.

(Thereupon the document referred to was marked Defendant's [351] Exhibit X in evidence.)

Mr. Jacobs: Mark that for identification, please.

The Clerk: The last exhibit is marked Defendant's Exhibit Y for Identification.

Mr. Jacobs: I show you Defendant's Exhibit Y for Identification, and ask you if you recognize it?

A. Yes.

Q. Will you state what it is?

A. Well, this is just a work sheet that the wholesalers use in making their route delivery to vendors and stores, et cetera.

(Testimony of Vern L. Nichols.)

Q. On this form is recorded the amount delivered on each edition to each corner by the wholesaler in his district, is that correct?

A. No, that isn't used for that purpose now, Mr. Jacobs.

Q. Was this or a similar form in use in 1937 to 1940?

A. This form has never actually been turned in to the office for any basic reports. It is used more as a convenience for the wholesaler to use in making his own distribution to the stores and news vendors.

Q. Was this form or a similar form in use in 1937 to 1940? A. Yes.

Q. On that form does he record the amount delivered of each edition to each vendor in his district?

A. I think he does, yes.

Mr. Jacobs: Defendant's Exhibit Y is offered in evidence. [352]

Mr. Fink: No objection.

The Court: It will be admitted.

(Thereupon the document referred to was marked Defendant's Exhibit Y in evidence.)

Q. (By Mr. Jacobs): Turning your attention to Defendant's Exhibit X, will you tell me who accomplished or filled out this form?

A. This is filled out by the street sales supervisor at the end of the day after his sales are all in, for one day's issue on the p.m. street sales.

(Testimony of Vern L. Nichols.)

Q. Where does he obtain the information from which he makes up this report?

A. From the wholesalers.

Q. Do they have a written report they submit to him at the end of each day's sales?

A. Each wholesaler makes up his own report and turns it in to the street sales supervisor, yes.

Q. Is there a regular form for such report?

A. Well, he may use that——

Mr. Fink: Sales slip; it is already in evidence.

Mr. Jacobs: No; let the witness answer the question, Mr. Fink.

A. That is part of it, Mr. Fink. There are two sources, really: that exhibit you had there a moment ago—I forget what you labeled it—he may use that for the total number of papers he has distributed during the night; and the rest [353] of his information in his actual street sales he gets from his corner tags from the vendors, or sales slips, as they are called in the exhibit, and then they will be recorded by the street supervisor to get the total street sales, which includes vendors, newsboys not under the union, and rack sales if it is morning sales.

Q. I take it that he also uses Defendant's Exhibit Y for some of his information?

A. Yes, I imagine he does.

Q. Let us digress just a moment, Mr. Nichols. During the years 1937 to 1940, were news vendors employed to sell the Chronicle in the morning, or is it—Just answer that question.

(Testimony of Vern L. Nichols.)

Mr. Fink: Objected to as to form. The news vendors were not employed at all.

Mr. Jacobs: Engaged, if you like.

A. I didn't quite get your question, Mr. Jacobs.

Q. As I understand it, the principal sales of the Chronicle in the years 1937 to 1940 were on the right side, is it not true?

A. Yes, the larger sale was on the night side.

Q. And news vendors were engaged to sell on the night side? A. Yes, sir.

Q. During the years 1937 to '40 how many news vendors, if any, were engaged on the day side of the Chronicle?

A. I don't know, Mr. Jacobs. I don't recall exactly how many [354] were on the morning side.

Q. Isn't it true that very few vendors are engaged to sell the Chronicle on the day side?

A. There are fewer on the morning side, yes.

Q. Isn't it true that the bulk of the sales on the morning side come through the coin racks?

A. At the present time.

Q. Likewise wasn't that true in 1940?

A. I don't recall; I doubt it very much.

Q. Do you think it was different in 1940 than it is today?

A. Yes. I think it was different then.

Q. In what respect?

A. The circulation has gained considerably since that period.

(Testimony of Vern L. Nichols.)

Q. I know, but in sales on the day side, is that accomplished in a different manner than it was in 1940?

A. No, I think the same methods are used now; practically the same.

Q. I ask you again, isn't it true today that the bulk of sales in the morning of the Chronicle is accomplished on the streets by coin racks and not by news vendors? A. Yes, that is true.

Q. That was true in 1940, wasn't it?

A. I don't recall without looking up the records, Mr. Jacobs, although I would say that it would be higher, yes.

Mr. Jacobs: Mark this for identification, please.

The Clerk: Defendant's Z for Identification.

Mr. Jacobs: I show you Defendant's Exhibit Z for identification and ask you if you recognize it, and if so, state what it is?

A. Yes, this is a report of the a.m. street sales. That is the morning side.

The Court: You mean it is the form on which he makes his report?

A. Yes.

Mr. Jacobs: Defendant's Exhibit Z is offered in evidence.

(Thereupon the document referred to was marked Defendant's Exhibit Z in evidence.)

Q. (By Mr. Jacobs): Who makes out that form?

A. That form is completed by the morning street sales supervisor.

(Testimony of Vern L. Nichols.)

Mr. Jacobs: Mark that for identification, please.

The Clerk: Defendant's Exhibit AA for Identification.

Q. (By Mr. Jacobs): I show you defendant's Exhibit AA for Identification, and ask you if you recognize it?

A. Yes, that is another form used by the wholesalers in making their distribution.

Q. Was that form or a similar one used from 1937 to 1940?

A. No, I don't think it was in effect at that time, Mr. Jacobs. I don't know how long this has been in effect. It has been probably three or four years.

Q. Was there a similar one in use in 1940?

A. No, I think that was one—the large size one in that [356] exhibit was used for that purpose.

Mr. Jacobs: Will you staple these together and mark them for identification, please?

The Clerk: Marked AB, Defendant's, for Identification.

Mr. Jacobs: I show you Defendant's Exhibit AB for Identification, which consists of seven pages stapled together, and ask you if you recognize them?

A. Yes, I do, Mr. Jacobs.

Q. Will you state what it is?

A. This is a form used by the San Francisco Chronicle in listing the amounts of guaranty due the vendors weekly.

Mr. Jacobs: Government's Exhibit AB is offered in evidence.

The Court: Very well.

(Testimony of Vern L. Nichols.)

Mr. Fink: I don't think I have any objection to the form, but I do want, before it is introduced in evidence, to ask that the Court request counsel to identify it as to time. [357]

Q. This form, or one similar was used in the years 1937 to 1940?

A. I don't know about 1937, Mr. Jacobs.

Q. At any time?

A. We had a mimeographed form when we first started, listing the amounts of profits by the vendors and the amounts of guarantees that was due them, but it is practically the same except it is now printed and lists the corners on the night side and the morning side.

Q. Your answer is that some time during 1937 to 1940 this form or one similar to it was in use.

A. Yes, to the best of my recollection.

Mr. Jacobs: I renew the offer.

The Court: It may be admitted.

(The document referred to was admitted in evidence and marked Defendant's Exhibit A-B.)

(A document was marked Defendant's A-C for identification.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit A-C for identification, and ask you what it is?

A. This is a form used by the Chronicle called a corner complaint.

Q. Was this form or one similar to it in use at any time in 1937 to 1940?

(Testimony of Vern L. Nichols.)

A. I don't recall, Mr. Jacobs. That is not under my jurisdiction, really. We have got several copies around. I had some in the file, but I have no use for them personally.

Q. You don't know when this form started in use?
A. No, I don't. [358]

Q. Does it go back as far as you remember?

A. I don't recall exactly. I just came across it not so long ago. They file them in a specific place, because they have been going to another place such as the circulation manager or his assistants, who was handling street sales.

Q. Mr. Nicholes, are you familiar with the relations between the wholesalers and their supervisors?

A. Somewhat. That is not in my department, however.

Mr. Jacobs: May it please the Court, I want to state this for the record: I have endeavored to shorten this proceeding. I have asked Mr. Nicholes at the stand what his acquaintanceship is with the paper.

The Court: What?

Mr. Jacobs: What his familiarity with the practice of the paper is. He states he is the office circulation manager.

Mr. Fink: The office circulation manager? He has not so stated.

Mr. Jacobs: I beg your pardon.

Q. State your function again.

A. Circulation office manager. There is a difference, however.

(Testimony of Vern L. Nichols.)

Mr. Jacobs: I have asked him also whether anybody else is familiar with that, and he points to the credit circulation manager who was not here during the taxable period. He also stated that nobody else here has that familiarity. This witness has not that acquaintanceship. I don't see how I [359] could pursue the line of examination. I thought I could get this stuff in evidence, based on the testimony of this witness. He repudiates the knowledge.

The Court: Does this arise because of this particular form?

Mr. Jacobs: Yes, your Honor.

The Court: Is there anything else except this form?

Mr. Jacobs: I don't know at this time. I want to pursue the examination further.

Mr. Fink: I have not objected to any forms, though I asked you to clear up a date. I have not objected to any forms.

Mr. Jacobs: I offer this in evidence. But, I will just state, your Honor, that this witness fails to establish clearly, in my mind whether this form I just put in evidence was used over the taxable period. His memory is hazy utterly about how far this form goes.

The Court: We cannot help that.

Mr. Jacobs: If it please the Court, I want to complete the record as to The Chronicle. There is nobody here from The Chronicle who is familiar with the period.

The Court: Well, if he is not familiar with the period, what are we going to do about it?

(Testimony of Vern L. Nichols.)

Q. (By Mr. Jacobs): Do you know, Mr. Nichols, how this form was used? [360]

A. I may have some general knowledge, Mr. Jacobs, but inasmuch as it is not my affair, I don't feel I should answer it because I might not be giving the truth.

The Court: Who knows about it? Whose function is it?

A. Mr. Gilroy used to know during his period, being circulation manager, and one of the street sales supervisors handles it now, together with Mr. Forbes, the City Circulation manager.

Q. How about the period 1937 to 1940?

A. I don't know who handled it then. I assume Mr. Gilroy did.

Q. (By Mr. Jacobs): Mr. Gilroy is the circulation manager, and he is out of town, I am told by Mr. Nicholes. In view of Mr. Fink's offer to prove, I don't see how we can prove it. I am trying to save the time of the Court to get in the evidence. I am doing my level best, but I want the Court to appreciate that.

The Court: What is the importance of this form?

Mr. Jacobs: This form, as I understand it, is commonly employed, is regularly employed, in the records kept in the regular course of business by the wholesalers of complaints filed by the wholesalers of delinquencies and deficiencies of the vendors.

The Court: Maybe Mr. Fink would testify they made complaints on this form or another form.

(Testimony of VERN L. NICHOLS.)

Mr. Fink: If your Honor please, that is the testimony right there. Mr. Casaday so testified that they are turned [361] in to the office. There is no dispute; I have not objected to one of these forms.

The Court: Apparently this may go in as a form that was used, or some form substantially similar to it, reporting complaints as to the conduct of the vendors during the period.

Mr. Fink: Your Honor, I will verify that, and state the fact to the Court whatever it is.

Mr. Jacobs: Will you mark these folders for identification, please.

Mr. Fink: Your Honor, let me say this: Mr. Gilroy has been in constant attendance on the court up until today. A conference of vital importance to all newspapers is going on, a conference on newsprint. He is attending that. That is the reason he is not here.

(The folders were marked Defendant's Exhibit A-D and A-E for identification.)

Q. (By Mr. Jacobs): Mr. Nicholes, I show you Defendant's Exhibits A-D and A-E for identification, and ask you if you recognize them?

A. Yes, I do.

Q. What are they?

A. These are files, they are the corner complaints, the third copy of which came along with the other data in connection with the news vendors' guarantee.

(Testimony of Vern L. Nichols.)

Q. These records are part of the regular business records of The Chronicle? A. Yes. [362]

Q. Do you know of your own knowledge, Mr. Nicholes, that the wholesalers filled out this form? Is that correct? A. Yes.

Q. Filled it out singly or in triplicate?

A. I think it was made in triplicate. I would not say for sure, because——

Q. That is not your department?

A. That is not my department.

Mr. Jacobs: The Government offers them in evidence, Defendant's Exhibits A-d and A-e.

The Court: Don't offer them in evidence. I am not going to read them, Counsel, for a determination of this case. Make a statement of what is in there and Counsel may agree.

Mr. Jacobs: May I read what I think is an illustrative one. These are typical corner complaints.

The Court: Just state the substance of what is in the file. Probably they won't dispute it. Why encumber the record with matters of that kind?

Mr. Jacobs: If it please the Court, to complete the record, these complaints state the actual working relationship between the wholesaler and the vendor. Now each one singly, there are a number of different types of complaints, which can only be appreciated by the over-all picture. No one complaint gives the Court the actual day to day relationship, but taken all along they do indicate to the Court, and do establish just how the wholesaler deals with the vendor, and [363] this is the best evidence, the day to day record.

(Testimony of Vern L. Nichols.)

The Court: What is the substance of the day to day records? What do they show?

Mr. Fink: May we have first the period covered? I have not even seen these, if it please your Honor. May we have the period identified?

Mr. Jacobs: 1942 and 1943.

Q. Mr. Nicholes, have you such records prior to this time?

A. No, that is all I could locate, Mr. Jacobs, as far back as that period there.

Mr. Jacobs: These are the only available records of the working relationship. I think rather than have this witness testify what the wholesalers and the vendors, here is the record, made day by day by the wholesalers.

The Court: These are complaints the wholesaler files with the newspaper as to what he finds in the way of fault with the way the vendors are operating?

Mr. Jacobs: Yes, your Honor.

The Court: That is the record of such complaints kept?

Mr. Jacobs: The nature of the complaints is what I am getting at, your Honor. For instance, it shows that the wholesalers normally tells the drunken vendor that he checks him in before the end of the sales period and sends him home. We think that is pertinent. Let me give your Honor some idea.

The Court: All right. [364]

(Testimony of Vern L. Nichols.)

Mr. Jacobs: A complaint of May 28, 1943, submitted by a wholesaler named Ford with reference to a vendor at Fifth and Mission, time 11:45. "When I drove up with the last edition at 4:00 p.m., he only had—" I wanted to give him \$10, he refused to accept, so I checked him in and sent the vendor home."

Mr. Fink: The trouble was he wanted to leave the corner before the regular time.

Mr. Jacobs: There is a demonstration of what the wholesaler did, said "You are through for the day"—"He refused to accept my order."

Mr. Fink: On the contrary, the report shows the vendor wanted to get out himself.

Mr. Linn: May I suggest, if your Honor does not want to read them, that you leave them in the envelope. In the Hearst case these matters were considered very material.

The Court: What case?

Mr. Linn: The National Labor Relations vs. Hearst. Just leave them in the records.

The Court: Well, they are part of the records of The Chronicle, are they?

Mr. Linn: Yes. If that is not clear, isn't that agreed to by stipulation?

The Court: These are taken from your records you produced them? [365]

The Witness: Yes.

The Court: All right. Put them in evidence.

Mr. Fink: If your Honor please, before you permit them in evidence, I want to make a formal

(Testimony of Vern L. Nichols.)

objection. I object to them on the ground that they are incompetent, irrelevant and immaterial, because it appears by the statement of counsel that they are for the period of 1943. Did you say 1942 and 1943, or just 1943?

Mr. Jacobs: 1942 and 1943.

Mr. Fink: 1942 and 1943, and have no bearing on what may have happened in the period of 1937 to 1940.

Mr. Jacobs: I ask the Court to note that the contracts for this period are in evidence. Again I say there is no substantial variation between the contracts for the taxable period.

The Court: There may be some evidence that similar procedure was followed. I will let the files be marked in evidence, and Counsel can call my attention, if it is part of the record of *The Chronicle*, I will allow it in evidence and Counsel can call my attention to such portions as he deems pertinent.

(The complaint files were marked Defendant's Exhibits Nos. A-D and A-E in evidence.)

Mr. Jacobs: No further questions. [366]

Redirect Examination

Mr. Fink: I think I have one other question that suggested itself to me. Have you got Exhibit A-B, Mr. Clerk, please.

Mr. Jacobs: I understand, your Honor, that if I want to recall a witness to identify the corner guarantee file which he was asked to produce, I may?

(Testimony of Vern L. Nichols.)

The Court: Well, you may be able to do that out of court. Just present it. I don't want to take up unnecessary time on the production of records. You will be given an opportunity to present it.

Q. (By Mr. Fink): Mr. Nicholes, I hand you Defendant's Exhibit A-B. Do I understand you correctly to testify that that form is the successor to a mimeographed form? A. Yes.

Q. And was the mimeographed form laid out on the same plan as that form was laid out?

A. Well, no. It was very incomplete. It was just ruled off more than anything else, to show the corners and the profits and the vendors.

Q. Mr. Nicholes, is it part of your duty in The Chronicle to keep track of the changes in the contracts of the vendors? A. No, it is not.

Mr. Fink: That is all.

The Court: That is all.

The Witness: I might say, your Honor, I did not mean [367] to be evasive a minute ago, in regard to those folders. The information Mr. Jacobs talked to me about, I completely overlooked that 1943. I did not mean to be evasive, just nervous so to speak. I did not check them on that subject, but I can supply that information.

Mr. Jacobs: There is no suggestion of bad faith.

(Witness excused.)

The Court: Have you a similar witness for the Call-Bulletin?

Mr. Fink: I have a similar witness. Mr. Winchester, will you take the stand, please.

E. R. WINCHESTER

called as a witness on behalf of the Plaintiffs;
sworn.

The Clerk: State your name to the Court, please.

A. E. R. Winchester.

Direct Examination

By Mr. Fink:

Q. What is your occupation, Mr. Winchester?

A. Circulation Manager for the San Francisco
Call-Bulletin.

Q. How long have you been such?

A. In that capacity for about three years.

Q. Were you with the San Francisco Call-Bulletin prior to that time?

A. I have been since 1929.

Q. What was your title prior to three years ago.

A. Assistant Circulation Manager.

Q. And you were such for how long?

A. Approximately four years. [368]

Q. The Circulation Manager of the San Francisco Call-Bulletin was named Pressly Mallory, is that correct?

A. That is correct.

Q. He has passed away. He died approximately three years ago?

A. Yes.

Q. Mr. Winchester, have you been in court continuously since the opening of this case?

A. I have.

Q. Did you hear the testimony of Mr. Parrish?

A. I did.

Q. And of Mr. Casaday? A. I did.

(Testimony of E. Winchester.)

Q. Does the San Francisco Call-Bulletin operate its street vendor sales in approximately the same manner as that described by Mr. Parrish and Mr. Casaday? A. They do.

Mr. Fink: Take the witness.

Cross-Examination

By Mr. Jacobs:

Q. You heard also the testimony of Mr. Nicholes? A. That is right.

Q. Would you say the Call-Bulletin maintains similar records, carries on operations similar to what Mr. Nicholes testified?

A. With some variation, Mr. Jacobs, but basically the same.

Q. Mr. Winchester, during the years 1937 to 1940 approximately how many corners or locations was the Call-Bulletin sold at by the Union street news vendors? A. Oh, roughly, 200 to 225.

Q. And do you know approximately on how many corners the sales [369] were insufficient to meet the guaranteed minimum under the Union contract?

A. Probably 25%, maybe a little in excess of that.

Mr. Jacobs: That is all.

Mr. Fink: That is all.

(Witness excused.)

Mr. Fink: Mr. McGarry, will you take the stand, please?

The Court: Still another paper?

Mr. Fink: No, I wanted to present everybody, your Honor. This is the Circulation Manager of the San Francisco Chronicle.

The Court: Well, do you need him?

Mr. Fink: I just wanted to ask him the same questions, because if you recall Mr. Nicholes qualified his testimony by saying he was the only supervisor of the office circulation, something of that sort.

FRANK R. MCGARRY

a witness called for the plaintiff; sworn.

The Clerk: State your name to the Court, please.

A. Frank R. McGarry.

Direct Examination

By Mr. Fink:

Q. Mr. McGarry, what is your occupation?

A. Circulation Manager of the San Francisco Chronicle.

Q. How long have you been such?

A. Since October, 1944.

Q. How long have you been with the San Francisco Chronicle? A. About fifteen years. [370]

Q. And prior to becoming circulation manager, what was your title?

A. I was on the road, a road man.

Q. That took you out of San Francisco?

A. Yes, entirely.

(Testimony of Frank R. McGarry.)

Q. Mr. McGarry, have you been in continuous attendance upon the court since this case opened?

A. I have.

Q. Did you hear the testimony of Mr. Parrish and Mr. Casaday? A. I did.

Q. Does the San Francisco Chronicle operate its street vendor sale in substantially the same manner as described in the testimony of those two gentlemen? A. I think exactly the same.

Mr. Fink: Take the witness.

Cross-Examination

By Mr. Jacobs:

Q. Mr. McGarry, you did not have anything to do with street vendors in the years 1937 to 1940, did you? A. No.

Q. Your answer to Mr. Fink's questions only applies to the present time, is that right?

A. Yes, sir.

Mr. Jacobs: That is all.

Redirect Examination

By Mr. Fink:

Q. By the way, you inherited a system when you became circulation manager, did you not?

A. Yes.

Q. You have operated that system exactly as it was before, have you? A. Yes.

Mr. Fink: That is all.

(Witness excused.) [371]

Mr. Fink: Now, if your Honor please, I think so far as the plaintiffs are concerned, that we are prepared to rest, with this reservation: I desire to examine the exhibits. I think one or two merely are marked for identification. I would like to offer them in evidence. Otherwise, the plaintiffs rest.

(Plaintiffs rested.)

Mr. Jacobs: At this time, if it please the Court, the Government files a motion for judgment at the close of the plaintiffs' case, for the reason that the plaintiffs have neither pleaded nor proved that the Union street news vendors, the subject of this contract, are independent contractors. I have filed a written motion for judgment which states that in different form, with several specific grounds, but in substance the reason is that the plaintiffs have not proved a cause of action or facts sufficient on which the Court can find for the plaintiffs.

Now, does the Court wish to entertain argument at this time?

The Court: Do you want to submit the case on that, or do you intend to present some evidence?

Mr. Jacobs: Yes, I intend to present some evidence. I don't mind telling your Honor that most of the Government's witnesses are not here. We did not want to take them away from their employment, because we thought the plaintiffs [372] would occupy most of the day.

The Court: How much time do you want for witnesses? I think you mentioned this morning they might be brief.

Mr. Jacobs: I think it might be the subject of stipulation.

Does your Honor want to take the motion under advisement?

The Court: I think that is the best thing to do, don't you, unless you want the case determined on the motion.

Mr. Jacobs: No, I do not.

The Court: I think it is best to take it under advisement at the close of the case. I will do that.

Mr. Jacobs: Now, a good many of the Government's witnesses are news vendors. I might say frankly, the news vendors I have never seen. They were subpoenaed by names furnished by the Union. The principal reason we want to call them is to introduce evidence——

The Government offers in evidence Defendant's Exhibit, what is that?

The Clerk: It has not been marked.

Mr. Jacobs: I will call Mr. Parrish, then.

The Court: Maybe Mr. Fink will agree that it may be offered in evidence.

Is that the one?

Mr. Jacobs: Yes.

The Court: That has been marked for identification. [373]

The Clerk: That has been marked for identification.

Mr. Jacobs: The Defendant offers Defendant's Exhibit N for identification, the income tax return of William Parrish for the year 1940, and before entertaining any objection from Counsel for the

plaintiffs, the purpose of this offer is to show a return by William Parrish as a news vendor for 1940, in which he reports part of his income from the sale of newspapers as a news vendor as wages as coming from The Examiner and The Chronicle.

Mr. Fink: Now, just a minute. Let me see that.

Mr. Jacobs: I would like your Honor to examine the form.

Mr. Fink: If your Honor please, I object to a statement—I hate to characterize a statement as untrue, but that statement is definitely untrue and Counsel knows it to be untrue. Schedule A of the income tax return form reads: “Income received from others, consisting of salaries, wages, fees, commissions, bonuses, and other compensation for personal services.”

Mr. Jacobs: Let me——

Mr. Fink: Pardon me——

The Court: Don’t behave like a couple of children.

Mr. Jacobs: If the Court please, may I have an opportunity to explain the purpose of the offer.

Mr. Linn: I suggest that Mr. Jacobs is not accustomed to Mr. Fink. [374]

The Court: Don’t get excited.

Mr. Fink: I thought I was addressing the Court.

The Court: I should like to try this case without calling you to order. Let me see the form.

Mr. Fink: Well, I would be delighted.

The Court: This is the regular income tax return form?

Mr. Fink: Yes.

Mr. Jacobs: May it please the Court, I want, if I may——

The Court: You are seeking to introduce these income tax returns of various vendors, on the ground that you claim it shows they reported their income from the sales of newspapers as salaries. Is that the point?

Mr. Jacobs: Also, your Honor, that they represented under Schedule A, you notice the name and address of the employer, and it gives the name of the paper in that case as in other cases.

I also want to call your Honor's attention to the purpose of the return. On the first sheet of the return, your Honor, it says: "Individual income and income tax return for gross incomes of not more than \$5000 derived from salaries, wages, dividends interest and annuities (Note: If you are engaged in a profession or business—including from income or you are a member of a partnership or had income or losses from renting or sale of property, use Form 1040)."

In other words, an entirely different form. This is [375] strictly a report of income from salaries and wages, not a business in some form.

The Court: Well, I suppose if they did that, it won't be the first time that people have either been confused by or filed the wrong income tax return. I would not want to decide this case, very frankly, on the basis of how these men reported their income taxes. You may have it in evidence for what is it worth. I say that frankly to you, that they followed the best form they could follow.

Mr. Jacobs: If the Court please, I won't labour the point. This is a representation of the publisher as an employer.

Mr. Fink: This representation of the publisher?

The Court: No, it is what the individual news vendor filed.

Mr. Jacobs: That is right, your Honor. They are the people involved in this case. They are the employees or independent contractors.

The Court: Well, of course, I might attach weight to this if it were the contention that this contract and relationship sought to be initiated by the parties under the contract were fraudulent or colorable, or done for the purpose of causing someone else to act thereon to his or their detriment. Then it would have weight, because it would be an admission that the form the parties went through was [376] designed to deceive someone else. Of course, this is not that kind of case, I gather from what you have stated to me here. If it is claimed, and that is why I asked that question at the beginning of the trial, if the Government contends this is a colorable transaction and entered into for the purpose of evading the effect of the Social Security laws, that is one thing. But, if it was entered into in order to establish a relationship so as not to be within the purview of the Act, of course that is a perfectly lawful, proper thing to do. The only question is, were their acts and the agreement such as would constitute them independent contractor, or employers and employees. Now, if it is under that theory we are proceeding in this case, then the mere

statement of the vendors in filing income tax returns, reporting under this form, I would not think would have much weight, because after all, it is what they did in the performance of the contract and under the terms of the contract, what they agreed to under the contract, that are the determining factors as to their status. Don't you think that is right?

Mr. Jacobs: That is right, your Honor.

The Court: After all, the Government was not interested in this matter; the Government is not trying to make somebody be an employee if he wants to be an independent contractor; it is not trying to make somebody be an independent contractor if he wants to be an employee. The Government occupies a position in which itself sets a very high standard of conduct. [377] It is not forcing anybody to do anything. The only question in the case is whether or not the actual status of the parties is such as by their acts, as evidenced by their actual conduct, and the agreement, is such as to take them within the purview of this statute or not.

Mr. Jacobs: Regardless of the relationship they think they entered into, honestly or otherwise. They may have entered it in all good faith.

The Court: I am not bound, and I don't think either side wants me to decide on the basis of what the parties think they were doing, or state about the relationship, but on their actual relationship.

Mr. Jacobs: In that connection Mr. Fink has stated the intention and belief of the parties, the parties being the publishers and the vendors, was

not that of employer and employee. They will point to Paragraph 1 of the contract which states that in so many words. Now, if that belief is correct, is relevant, if the belief of the parties is relevant, good faith or bad faith belief, if the belief is relevant, then this also is representation of the belief of the relationship of the parties, a return that states they believe in effect, it is a form statement, believe the publishers as their employers.

The Court: Well, you may mark it in evidence as the statement of Mr. Parrish, but subject to Counsel's objection [378] so the record may be very clear on it. I will say to you now, that I don't attach much weight to it in determining the issues presented, so you won't be misled when you submit the case on that. I think the issue is a much more definite one, and has to be determined upon the actual conduct of the parties, their actual agreement, and what they did under the agreement rather than by statements that they may have made that were beyond and outside of the limits of their actual relationship. In other words, I don't think statement would be any different than some statement Mr. Parrish may have made at a teaparty to someone else, that he really was an employee; that the way he felt about it he was an employee, because it would not make any difference. The matter has to be determined on the basis of what the facts disclose to be the actual status of the parties.

Mr. Fink: For the purpose of the record, your Honor, I object to the introduction in evidence of Defendant's Exhibit N, upon the ground that it is

incompetent, irrelevant and immaterial; on the further ground that it is hearsay as concerns the publishers, The San Francisco Chronicle and the Hearst Publications, Inc. And may I gently suggest, your Honor, I think it is a breach of the confidential section of the Income Tax Statute.

The Court: Where did this income tax statement come from? [379]

Mr. Fink: Well, Counsel produced it.

The Court: Maybe Mr. Parrish produced it.

Mr. Jacobs: I produced it; I produced them all.

Mr. Fink: No, Mr. Parrish did not produce it. This gentleman, Counsel here, has a stack of them. I think it is in contravention of the statute.

Mr. Jacobs: What statute?

Mr. Fink: The Income Tax Statute which provides that income tax returns are confidential, and have been for many years last past.

The Court: There may be something in that.

Mr. Jacobs: If it please the Court, this is not a question of a third party going into the Government to ask for a disclosure. John Doe cannot come to the Treasury Department, but this is the Department of Justice taking information furnished by the Treasury Department for the official use of the Government. Furthermore, I know of no statute that prohibits the use of the Department of Justice of anything bearing on the issues here.

The Court: I am not so sure about that, Counsel. I don't think the Department of Justice, statutory provisions or not to the contrary, has a right to dig up this man's income tax statement and offer it in

evidence here in this court on a matter of whether Social Security tax shall be paid. [380]

Mr. Jacobs: I have no desire to disclose it to the world or anybody else.

The Court: I know, but once the income tax statement is offered in evidence, it is disclosed, because the record is in a court proceeding. Anybody interested in the case can come around and find what Mr. Parrish's income is, once it is offered in evidence. I am not sure. I have not had that point submitted to me, but I would feel it is a subject-matter for the exercise of some discretion on the part of the Court.

Mr. Fink: Mr. Parrish is not a party to this action, your Honor, and if his income became a material factor in the case, I would think the Government, by some means, could with good grace offer the return. But to dig up his return because he happens to be an official of the Union, and introduce it in evidence, I say is a violation of the statute.

The Court: It might be possible that a tax return might be admissible by way of impeachment. If you asked him the question: "Is it not the fact that you, yourself, claimed your income or salary from the San Francisco Chronicle" and he denied it, you might be able to produce it for that purpose, to negative the statement. I don't know that you have a right to come in out of the clear sky and offer a man's income tax statement in a case of this kind. After what Counsel has said to me, I would want to see some authority [381] before that would be done.

Mr. Jacobs: Let me state the position, so there will be no question about it, your Honor. This return is offered in the case of Mr. Parrish, not because he is not a party to the suit, but he is a party to the contract here under interpretation, and it is clearly established under the Restatement of Law and other authorities that belief of the nature of the relationship between the parties is evidence of their relationship. That is stated in the Restatement of the Law, the existing law as to what is evidence of the employment relation, the belief of the parties.

The Court: I can understand that, but I think that what we are talking about is, is the right of the Attorney General to come in here and having gotten income tax statements in this way, offer them in evidence in the case.

Mr. Jacobs: I will preserve the confidential nature if there is any. I don't admit there is. I will be glad to read it in evidence without the amounts. There is no question that he is a vendor, the fact that he reported an unspecified amount from the newspaper as his employer, and I will withdraw the offer of the return itself.

The Court: Well, I suppose, subject to the objections that have been made, probably you could get an admission, Counsel would be willing to stipulate that you are prepared to show that a number of news vendors reported in their income [382] tax returns, under the column you have designated, income from sales of newspapers, The Chronicle, The Examiner, or the Bulletin, as the case may be.

Mr. Jacobs: That is perfectly satisfactory to the Government.

The Court: Is that what you are going to bring them all in for?

Mr. Jacobs: After getting a few of them to testify, I will offer a stipulation as to the remaining.

The Court: On this matter?

Mr. Jacobs: Yes.

The Court: Are you able to state in number of returns that that is the situation?

Mr. Jacobs: Yes, your Honor.

The Court: Well, can you come to some stipulation as to that, Mr. Fink? Subject to its competency?

Mr. Fink: I am sorry. I was talking to Counsel. May we try to get together before we resume?

The Court: Let me find out if there will be other evidence in this case.

Mr. Jacobs: I am not certain. I may want to call another witness.

The Court: Because I have ordered all the people in the other case to come back, and you heard that two of the witnesses, one on each side, have come from a distance. I [383] know you have too, of course. I don't want to cut off your evidence, but I want to try to shorten this, if it is on matters subject to the materiality and weight, that are not subject to dispute. See if you cannot work out a stipulation on this subject of income tax returns.

Mr. Jacobs: May I suggest it now?

The Court: Certainly.

Mr. Jacobs: I suggest a stipulation——

Mr. Ladar: Judge, this is news to me. I am here on behalf of this Union. I think I would be remiss in my duty here if I did not say to your Honor that I would like to protest the use of the income tax statements of the members of this Union for any purpose. I don't think for the purposes of this case anybody had a right to get them, or look at them. If there was something here I felt was going to be vital to you in the determination of the case, I don't think I would make a statement, but I have listened and looked at the statement. I don't see any place on the statement that Mr. Parrish could have entered his income other than the way it is entered.

The Court: Counsel in quite right; this form is only for the use of so-called wage earners. There is another form if you have income from a business or profession; you use another form. Of course, if this form is used, that is the only place it can be entered, but it is the use of this form. [384]

Mr. Ladar: Therefore I have my objection. That he used the particular form 1040-A, I think he could do that. Unless there is some right the Government has to take this information, I would like to lay before your Honor the proposition, but I would like to object on behalf of the members of this Union to the use of their income tax returns in a case such as this. I don't think anybody had a right to take them or look at them.

Mr. Jacobs: May I suggest a stipulation to this effect: that the following named individuals, mem-

bers of the News Vendors Union, engaged in the sale of one of the three papers, the Chronicle, The Examiner, or the Call-Bulletin, that they filed income tax returns for the year 1940 on form 1040-A in which they stated their occupation was news vendor, listed in Item 1 their income from the sale of newspapers under Item 1 as being from salaries, compensation for personal services. On Schedule A they have listed the name of the publisher or newspaper as their employers, and signed the return.

The Court: Well, suppose you gentlemen consider that stipulation.

Mr. Fink: I will consider the stipulation, but your Honor, I point out to the Court that I doubt my right to look at these returns. Counsel has a number of them, obviously. [385]

The Court: Are these copies?

Mr. Jacobs: No.

Mr. Fink: He has a whole group. I would say 35 to 40 there. I don't know if that is accurate. I doubt my right to look at that, and I would think I would want to examine them to see exactly what the different men said before I could enter a stipulation. If a stipulation can be worked out where it is put in general terms, I may be able to accept it without examining them. I don't want to examine them.

Mr. Jacobs: Did you listen to the form of stipulation?

Mr. Fink: I certainly did, and I found you said, "The following named men". I assumed you were going to name each individual.

Mr. Jacobs: Without naming the income in any respect.

Mr. Fink: You said "the following named men".

Mr. Jacobs: That is right.

Mr. Fink: I don't know what names are there.

Mr. Jacobs: These names were taken from a roster furnished by the Union. There is no doubt in my mind that they are Union news vendors engaged in the sale of the plaintiffs' newspapers.

Mr. Fink: I will make this suggestion, your Honor, I will consider the stipulation; Mr. Ladar will furnish me with information necessary, and if I can stipulate to it, I will. [386]

The Court: Very well. Now, aside from that you say there will be some other evidence, you think?

Mr. Jacobs: Yes, two or three witnesses. It should not take more than the remainder of the morning. I am sure of that.

The Court: Because I have all these people coming back. Maybe we better start this case a little earlier, then.

Mr. Jacobs: I hope the Court understands that I tried to be cooperative.

The Court: I am not complaining.

Mr. Jacobs: No pressure was put on me by the Court or Counsel, but I would have gone to undue length by stipulation to shorten the case, because I do not want to extend it indefinitely under your Honor's present feeling.

The Court: All I have been attempting to accomplish is to get Counsel to try to agree upon some of the obvious facts; that is all.

Do you want to look at the 1943 records of The Chronicle referred to?

Mr. Jacobs: Yes, your Honor.

The Court: Well, can the witness bring those at 9:30 tomorrow?

Mr. Jacobs: I think he has left, your Honor.

Mr. Fink: He is back there.

Mr. Ladar: Can you bring the guarantees that you were [387] asked to produce?

Mr. Jacobs: I can confer with Mr. Nicholes.

The Court: See if you cannot get that in shape so that you can produce at 10:00 o'clock. We will take a recess then until 10:00 o'clock.

(Adjourned to Wednesday, April 3, 1946,
at 10:00 o'clock a.m.) [388]

Wednesday, April 3, 1946, 10:00 A.M.

Mr. Jacobs: If your Honor please, at the close of the plaintiff's case, the Government moved for judgment, and at that time I filed a written notice. The motion filed was simply on behalf of the two cases of the Hearst Publishing Company. I overlooked filing a written motion against The Chronicle Company.

The Court: Very well. It may be filed.

Mr. Jacobs: Unless there is some objection, I would like to recall Mr. Casaday for one or two questions.

The Court: Is Mr. Casaday here?

Mr. Fink: Yes, he is here, your Honor. There is no objection upon my part. Mr. Casaday.

J. D. CASADAY

called as a witness for the Government, having been previously sworn, testified as follows:

Direct Examination

By Mr. Jacobs:

Q. You understand, Mr. Casaday, that you are still under oath? A. Yes, sir.

Q. Mr. Casaday, will you state to the Court in what respects, if any, the sale of The San Francisco Examiner by adult street news vendors was different after August 31, 1937, than the way it was sold before, understanding that my question includes [389] the manner in which The San Francisco Examiner distributed these papers to the street vendors in all phases from the time it is printed to the time it is sold to the public.

A. I want to understand your question clearly.

Q. That is right.

A. You mean the manner of distribution of newspapers to the vendors before and after the first of April, 1937?

Q. No.

The Court: August 31, 1937.

A. Or August 31, 1937.

The Court: I gather that is what Counsel means.

Q. (By Mr. Jacobs): I don't mean just the delivery of newspapers to the vendors. I mean the entire practice, the working relations between the vendor and the publishers.

A. Well, now, that question is rather difficult to answer, because in some ways it is ambiguous.

(Testimony of J. D. Casaday)

I would say that the principal difference in the practice in the distribution and sale of newspapers by the representatives of the publishers to the vendors, would be in instructions to the **wholesalers** that definitely these vendors were independent contractors and to treat them as such.

Q. That is the only difference?

A. I beg your pardon?

Q. That is the only difference?

A. That is the principal difference that I could be able to point out to you at this time. [390]

Q. Was there any other difference?

A. Well, I could not think of any right offhand.

Q. Mr. Casaday, prior to August 31, 1937, were any instructions given to the wholesalers as to how they were to be treated, whether they would be treated as employees or independent contractors?

A. I don't believe there was any actual instructions given, Mr. Jacobs, but the inference at all times was that the news vendors were independent contractors.

Q. You mean the members of your circulation department gave the wholesalers to understand in one way or another? A. That is correct.

Mr. Jacobs: No further questions.

Mr. Fink: No questions.

(Witness excused.)

Mr. Jacobs: We will call Mr. Nicholes, please.

VERN L. NICHOLLES

called as a witness for the Government, having been previously sworn, testified as follows:

Direct Examination

By Mr. Jacobs:

Q. Mr. Nicholes, have you with you any records of the payment of bonuses or guarantees to corner news vendors?

A. Yes, I have a partial record here for 1943, which is as far back as I have records on that.

Q. They are official records of the company?

A. Yes. [391]

Q. What do those records disclose as to the number of vendors engaged in the sale of The Chronicle? Will you state the period, please.

A. The period here is March 14, 1943, until April 11, 1943, that is each week ending, and there were approximately 250 vendors which we have registered here as selling papers, and from their earnings we determined there were around 78 to 80 receiving guarantees.

Q. May I see one of them, please? And what do those records disclose as to the number of individuals who received payments of bonuses or guarantees?

Mr. Fink: Just a minute, your Honor, obviously the objection that the records are the best evidence is good, and I object upon that ground. I don't know that this gentleman has made a survey of these records which appear to be quite volumi-

(Testimony of Vern L. Nicholes.)

nous. I object upon the ground that the records themselves are the best evidence.

The Court: Well, that may be so, I think. Counsel is just taking a short cut. If the witness knows, I will let him answer.

Q. (By Mr. Jacobs): Did you make a study and inspection of these forms?

A. Yes, I glanced over them and hastily made up the figures which seemed to be approximately correct, although they vary from week to week, from one period to another period. This is 1943, but, as I say, those figures were approximately [392] correct.

Q. And what figures are disclosed?

A. What do you mean by that?

Q. How many individuals received payments or bonuses or guarantees?

A. Well, approximately 78 to 80, I would say, out of 250.

Q. And that percentage covers how many different groups that you have there?

A. That is about four or five weeks.

Q. Are you familiar, is it within the province of your duties to ascertain and observe the number of vendors who receive bonuses or guarantees?

A. Yes.

Q. Would you say these figures are representative?

A. Well, no, I would not say in the whole period. They seemed to be along for four or five weeks. For example, at the present time the percentage

(Testimony of Vern L. Nicholes.)

is considerably down, only about sixteen or twenty out of the total.

Q. And after——

Mr. Fink: Let's get the answer.

The Court: Had you finished your answer?

A. Just one or two items there. I stated in 1946, the present period, if you are taking comparative figures, it is considerably less than 1943; it was sixteen to twenty.

Q. (By Mr. Jacobs): Out of how many vendors?

A. Out of approximately the same number of vendors.

Q. Do you recall during the period 1937 to 1940 what percentage [393] of vendors received payment of bonuses and guarantees?

A. No, I don't.

Q. Have you copies of corner complaints in your possession there, Mr. Nicholes?

A. Yes, I do.

Mr. Jacobs: Can this be marked for identification, please?

(The document referred to was marked Defendant's Exhibit AF for identification.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit AF for identification and ask you what it is?

A. This is some triplicate copies of corner complaints during part of the period of 1943 and 1944 which the wholesaler turns into the circulation department.

(Testimony of Vern L. Nicholes.)

Mr. Jacobs: I offer it in evidence.

The Court: This is similar to the others?

Mr. Jacobs: Yes, sir.

The Court: Very well.

(The document referred to was received in evidence as Defendant's Exhibit AF.)

Q. (By Mr. Jacobs): Have you any further corner complaints?

A. No, sir, that is all I have.

Q. Mr. Nicholes, you stated that approximately 70 vendors received payments of bonuses or guarantees for the period you mention in 1943. Are you sure in your own mind that that includes both bonuses and the guarantees? [394]

Mr. Fink: Just a minute, I object—I withdraw the objection.

A. I think the Court should be informed as to the difference between what we call bonus, and guarantee. It is the same thing. The bonus is dubbed that for our own information to distinguish between the actual amount of guaranteed as earnings per week and an additional amount which is guaranteed in addition to the other amount of earnings, which is dubbed by the term "bonus".

The Court: That is not clear to me. What do you mean by that?

Mr. Jacobs: It is clear in the contract in evidence.

The Court: Is that it?

Mr. Jacobs: The contract provides for the payment of amounts not designated as bonuses.

(Testimony of Vern L. Nicholes.)

Q. Is it correct to state, Mr. Nicholes, that in the years 1942 and subsequent thereto the contracts with the Union provided that in the event a news vendor made a certain minimum profit in the contract, but did not make \$40—I think that was the figure—he was entitled to receive an additional amount?

A. That is correct, although I don't believe it was \$40 at that time in 1942.

Q. If he made over the minimum, but less than a certain amount, he would get an additional amount from the publishers? A. That is correct. [395]

Q. When you stated approximately 70 vendors received bonuses or guarantees, are you sure in your own mind that that number includes both bonuses and guarantees? A. It does.

Mr. Jacobs: No further questions.

The Court: Any questions?

Mr. Fink: No.

The Court: That is all.

(Witness excused.)

Mr. Jacobs: Mr. Forbes.

H. F. FORBES

called as a witness for the Government; sworn.

The Clerk: State your name to the Court, please.

A. H. F. Forbes.

Direct Examination

By Mr. Jacobs:

Q. Mr. Forbes, you are employed by The Chronicle? A. Yes, sir.

(Testimony of H. F. Forbes.)

Q. In what capacity?

A. City Circulation Manager.

Q. How long have you held that position?

A. About five years, I cannot recall for sure.

Q. Did you work for The Chronicle prior to that time? A. Yes, sir, since 1932.

Q. In what capacity?

A. Well, in various capacities.

Q. In the circulation department?

A. In the circulation department entirely, though.

Q. I show you Defendant's Exhibit AF, which has been introduced [396] in evidence, which are copies of the corner complaints, and ask you if any of your duties have any relation to the corner complaints? A. Yes, sir, they do.

Q. Will you state what the relationship to the corner complaints is?

A. When the District Manager writes out a corner complaint——

Q. You mean the wholesaler?

A. When the wholesaler writes out a corner complaint, the copy of the complaint is given to me, and if any action is required, I call the Vendors Union and as a rule I speak to Mr. Kaloch, and pass on the complaint to him.

Q. What is the function of Mr. Kaloch?

A. He is the business agent of the Vendors Union.

Q. How long has that practice been in force?

A. It has always been in force as far as I know.

(Testimony of H. F. Forbes.)

Q. Are these made in triplicate?

Mr. Fink: Was that an inadvertent word,, "enforced"? Enforced by whom?

Mr. Jacobs: In force, not enforced.

Mr. Fink: I am sorry.

A. These, as a rule, are made in triplicate.

Q. (By Mr. Jacobs): What disposition is made of the copies, if any?

A. Well, the reason we make them in triplicate is so that the various heads of departments will have a record of what happened, and in case there was some dispute about payment, or something [397] like that, when the payment came in we just marked it paid and filed it away. If we did not have it in triplicate, we would not have sufficient to keep the records intact.

The Court: He wants to know who gets the copies.

A. Pardon me. I receive two copies and Mr. Nicholes receives the third copy.

Q. (By Mr. Jacobs): You keep two copies?

A. I keep two copies and one I will throw away, one I file away in a file which I will keep maybe a month or two; the other, I have pending file. When that particular business is cleared up, I will scratch it off, throw it away.

Q. (By Mr. Jacobs): Have you had instances with corner complaints where they noted delinquencies or violations of the contract by a vendor?

A. I did not get the question.

Q. Have there been instances?

A. Yes, sir.

(Testimony of H. F. Forbes.)

Q. And would such a typical instance be the failure of a vendor to stay on the corner?

A. It could be such an instance. I don't know whether it is typical.

Q. You have had such instances?

A. Yes, sir.

Q. What would you say to Mr. Kaloch with reference to such a complaint?

A. I would notify him that Mr. So-and-So on such-and-such a corner was reported to have gone off the corner before the established quitting time.

Q. Would you in any way state the dissatisfaction of the [398] publishers with that performance?

A. I think that would be implied. I don't know that I would state it.

Q. Did you expect him to take action upon those complaints?

A. The Union will take action according to what it sees fit. In some cases we expect them to take action; in other cases we merely notify them of it, so——

Q. And in those——

Mr. Fink: Let the witness finish.

A. And in some cases we will notify them, knowing no action will be taken.

Q. (By Mr. Jacobs): Now, in instances in which you expect them to take action, what do you do to ascertain whether action has been taken?

A. In the event a vendor fails to pay for papers he buys from us, if I notified Mr. Kaloch that he owes us, say, \$3, I keep a memorandum of the third

(Testimony of H. F. Forbes.)

copy of the corner complaint on my desk. Now, if the vendor pays up the following evening, I am advised of that by the wholesaler, and I mark that paid. Now, if he does not pay, then we have a system of collection which is explained in the contract.

Q. There have been cases, have there not, when you have stated to Mr. Kaloch that the vendor was incompetent, based on the reports of the wholesaler? A. Yes.

Q. And what do you state in such cases?

A. In cases of incompetents, generally they are the result of [399] intoxication, something of that nature, and as soon as the vendor is reported intoxicated, Mr. Kaloch is advised immediately. Then he, himself, does what he feels is best to do.

Q. You have no interest in any action he takes on those complaints?

A. We have an interest, definitely.

Q. You ascertain what action is taken, do you not?

A. We would naturally know. Mr. Kaloch, it has been his practice to go down to the corner to see if the complaint is correct. If he finds the man intoxicated, he generally replaces the intoxicated man with a sober man. We would know, because we have to supply the new man with papers, yes, sir.

Q. Do you know of cases where men have been fined by the Union? A. No, sir.

Q. You have never heard of them?

A. I have heard of them, but I don't know.

(Testimony of H. F. Forbes.)

Q. Have you ever told Mr. Kaloch that a vendor was no longer useful as a vendor?

A. I don't know that I have used the words "no longer useful". I might have said that the sale was not as good as the former man's, something of that nature. I don't quite connect the word "useful" there.

Q. Did you ever state to Mr. Kaloch that a particular vendor's contract would be terminated?

A. Yes, I have stated to Mr. Kaloch that a contract would be terminated.

Q. For cause?

A. Yes, sir, according to the contract.

Mr. Jacobs: No further questions. [400]

Mr. Fink: No questions.

The Court: That is all.

The Witness: Thank you.

(Witness excused.)

Mr. Jacobs: Mr. McCaffrey.

MORRIS P. McCAFFREY

called as a witness for the Government; sworn.

The Clerk: State your name to the Court.

A. Morris P. McCaffrey.

Direct Examination

By Mr. Jacobs:

Q. Mr. Caffrey, where are you employed?

A. The California Employment Stabilization Commission.

(Testimony of Morris P. McCaffrey.)

Q. What are your duties there?

A. Principal Counsel for the Commission.

Q. How long have you held that position?

A. Since February of 1936.

Q. That was your function and duty in 1941?

A. It was, under a different title, however. At that time it was known as the Rules and Regulations Officer.

Q. Do you deal with records of the California Employment Commission? A. Yes, I do.

Q. What is your connection with those records?

A. Records involving disputes before the Commission, so far as benefit payments, or tax collections, are concerned, those records generally are referred to the legal department. [401]

Q. Where?

A. The legal department of the Department of Employment.

Q. Those records are kept in the legal department? A. That is correct.

Mr. Jacobs: Will you mark that for identification.

(The document referred to was marked Defendant's Exhibit AG for identification.)

Mr. Jacobs: Mark that for identification, too, please.

(The document referred to was marked Defendant's Exhibit AH for identification.)

(Testimony of Morris P. McCaffrey.)

Q. (By Mr. Jacobs): Mr. McCaffrey, I show you Defendant's Exhibit AG and Defendant's Exhibit AH for identification. I show you Defendant's AG for identification, and ask you what it is.

A. This exhibit contains an excerpt from the Commission's minutes of a meeting of the Commission held under date of May 6, 1941, in Sacramento, California.

Q. Have you seen this before?

A. Yes, I have.

Q. This came from the records of the Commission? A. They did.

Q. I show you Defendant's Exhibit AH for identification, and ask you what it is?

A. Exhibit AH is a statement of the Newspaper and Periodical Vendors and Distributors Union, regarding a proposed change of Rule 8.19 of the California Employment Commission. [402]

Q. That was filed with the Commission?

A. It was.

Q. And is taken from the records of the Commission? A. That is correct.

Mr. Jacobs: I offer in evidence Defendant's Exhibit AG and Defendant's Exhibit AH.

Mr. Fink: I object to it upon the ground that it is incompetent, irrelevant and immaterial; upon the further ground that no proper foundation has been laid; upon the further ground that they tend to prove nothing in issue in this case, if your Honor please.

The Court: What are they about?

(Testimony of Morris P. McCaffrey.)

Mr. Jacobs: If given an opportunity I will tell the Court. Defendant's Exhibit AG is a transcript, a certified copy of a transcript of the minutes of the meeting of the California Employment Commission, containing testimony of Mr. Charles H. Bowers then secretary and treasurer of the News Vendors Union here involved, in which he made—I take the liberty of interpreting his testimony before the Commission, his remarks before the Commission—in which he stated, mind you, speaking as secretary and treasurer of the Union, that in his opinion under the then existing contracts the News Vendors were not independent contractors. That, I think, is a fair statement of the substance of his testimony.

The Court: Just a minute. What was the nature of the hearing? What were the hearings about?

Mr. Fink: They had to do with the revision of rule 8.19 of the California Employment Commission, which was a rule exempting from taxation, under the California system, the newsboys in the State. It has been said that it included the vendors, but I do not believe that it did. However, that is immaterial.

The Court: If I admit this in evidence, then I am just accepting the opinion of someone else.

Mr. Fink: That is entirely true, your Honor. And may the record also show, your Honor, that Mr. Charles H. Bowers is present in court at this time, under subpoena of Mr. Jacobs, and if they

(Testimony of Morris P. McCaffrey.)

want to prove this record and prove Mr. Bowers' views, he is available.

The Court: You are not objecting that this is not a correct record, are you?

Mr. Fink: No, your Honor. I am objecting on the ground that it is incompetent, irrelevant and immaterial, that no proper foundation has been laid, and that it does not tend to prove any issues, prove or disprove any issues in this case.

Mr. Linn: I think, if your Honor please, it might be material to inspect the California Commission's rule, which was under consideration. It was a definite rule of the Commission that news vendors were independent contractors, and therefore not subject to the Act. The Newspaper Vendors Union participated in these hearings and contended that they were [404] employees, and the admissibility, despite the contract—the contract was brought up and rehashed—it shows what we believe to be a consistent course of conduct on the part of one of the parties to this contract, that they were employees.

The Court: You don't mean "course of conduct".

Mr. Linn: Contention.

The Court: They said.

Mr. Linn: They always stated that.

Mr. Jacobs: And represented.

Mr. Linn: Made representations to that.

Mr. Jacobs: This is not binding on this court; I have set no such illusion. I do believe that belief is material.

(Testimony of Morris P. McCaffrey.)

The Court: There seems to be some conflict, then, between the officers of the Union on this.

Mr. Jacobs: Definitely, yes.

The Court: One officer said they were independent contractors, and the other says they were not.

Mr. Jacobs: These are the views of the secretary and treasurer who, under the by-laws, was the acting head, as secretary and treasurer, during the period here involved.

The Court: My own opinion is that a mere statement of opinion by a party involved, of what he thinks is the status, is of no help to the Court.

Mr. Jacobs: This was not a personal individual opinion.

The Court: He was an officer of the Union. By the same [405] token, if I considered that as having weight, I would have to give weight to the statement of the newspaper publishers. They think it is an independent contract, and I am not bound, nor should I be influenced by a statement of either party as to what he thinks the relationship is, but I should determine it on what, in fact, the relationship is.

Mr. Jacobs: My understanding, from the testimony introduced by the plaintiffs, is that they think it is material that the publishers even think it is one of independent contractor.

The Court: No, the testimony was that they wanted an independent contractor relationship; that is why they put it in the contract. Whether or not they got it is what the Court has to determine.

(Testimony of Morris P. McCaffrey.)

You may have it marked for identification, but I see no point in having it admitted in evidence. If it is admitted in evidence, then I would have to give some weight to it, one way or the other, as evidence, and I do not think it is proper evidence. You may leave it, and have it marked for identification so the record will show it has been offered, and I will sustain the objection to its admission in evidence.

Mr. Jacobs: Mr. Fink, have you the counter-proposal?

Mr. Fink: Yes. May it please the Court, I am delivering to Counsel the counter-proposal of 1937 which he has asked for. Now, with reference to the other counter-proposals, as Mr. [406] Bitler testified——

The Court: Just a minute. Is this all of this witness?

Mr. Fink: No questions. You were an excellent witness, Mr. McCaffrey.

(Witness excused.)

The Court: How about the other exhibit? You had another exhibit that you had marked for identification.

Mr. Fink: It is the same thing, your Honor, it relates to the same thing.

Mr. Jacobs: I offered them both in evidence.

The Court: Both covered the same point?

Mr. Jacobs: Yes, your Honor.

The Court: The offer of the second exhibit in evidence will be denied. You may have them marked for identification.

Mr. Fink: Now, Mr. Jacobs, I have delivered the proposal of June, 1937. You recall Mr. Bitler's testimony that subsequent counter-proposals were copies of the previous contracts which are already in evidence.

Mr. Jacobs: Do I understand that Counsel stipulates that the document which I have in my hand is the first counter-proposal submitted by the publishers and the Publishers Association?

Mr. Fink: I have delivered it to you as that.

Mr. Jacobs: I offer it in evidence as such, without further identification, under the stipulation of Counsel. [407]

The Court: Very well.

(The document referred to was admitted in evidence as Defendant's Exhibit AI.)

Mr. Jacobs: The Government offers to stipulate that the document I have in my hand consisting of twelve pages and four exhibits thereto, is a true copy of the letter written by the News Vendors Union to the Commissioner of Internal Revenue, Deputy Commissioner Self, dated March 16, 1945.

Mr. Fink: No objection.

The Court: It may be admitted in evidence.

Mr. Jacobs: The Government offers it in evidence pursuant to that stipulation.

Mr. Fink: I did not hear you.

Mr. Jacobs: The Government offers it in evidence.

Mr. Fink: No objection at all.

The Court: Let it be marked.

(The document referred to was marked Defendant's Exhibit AJ in evidence.)

Mr. Jacobs: May it please the Court, from the discussion late yesterday afternoon, there seemed to be a touchiness about the use of the income tax returns of the news vendors. We have made an investigation of the right to use those returns, because I, no more than anybody else, have any desire to break the law or the regulations or put in anything [408] otherwise privileged. The Commissioner of Internal Revenue has handed down a Treasury decision—a Treasury decision having the force and effect of a Treasury regulation—under which he interprets the law and puts into force, regulations authorized by law. Under the Treasury decision dated September 29, 1939, there is specific provision for the use of returns in litigation, which provides as follows:

“The return of an individual, partnership, corporation or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that

publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto."

showing that the news vendors made a report on an income tax return of their income from the sale of newspapers on the form 1040-A, and under the heading that recites "From wages, salaries, commissions" et cetera, I would not admit the income tax returns of these parties in evidence, because I do not feel that there is any necessity whatsoever for making a public disclosure, by the admission in evidence of the returns of these men, of their income tax returns.

Mr. Fink: If the Court please, I might say this: I attempted to reach an agreement, or Mr. Jacobs attempted to reach an agreement with me last night on a stipulation. We were a little apart, but I now agree to stipulate that a number of vendors in the year 1940 filed income tax returns on form 1040-A. And if that stipulation is accepted, the controversy is over.

Mr. Jacobs: Well——

Mr. Fink: What more could the Government get if it introduced them in evidence?

Mr. Jacobs: Well, this is what I would like to have, it simply amplifies the matter without disclosing the content of the returns, the Government would offer to stipulate that a specific number of individuals, of whom we have the returns, there are a substantial number of individuals who were vendors, news vendors, members of the News Vendors Union and engaged in the sale of the plaintiffs' newspapers during the year 1940, [410] filed income tax returns for 1940 on form 1040-A, in which they stated in the appropriate place their occupation being that of news vendor.

Mr. Fink: That is argument, isn't it, Counsel?

Mr. Jacobs: No, it is stated in the form.

Mr. Fink: Well, I say that is argument.

The Court: Well, you gentlemen seem to have difficulty agreeing to this. I see what you are getting at. Will you permit me to make a statement and see if you can agree?

Mr. Fink: Certainly.

The Court: All right. Will it be stipulated—how many forms have you?

Mr. Jacobs: I have fifty, I think.

The Court: Will it be stipulated that approximately 50 news vendors who are members of the News Vendors Union, in 1940 filed income tax returns on form 1040-A with the Collector of Internal Revenue, in which they reported receipt of money from the plaintiffs in this case, under the heading—

Mr. Fink: Schedule A, your Honor.

The Court: Under the heading "Schedule A," in such returns; in which they reported in such returns the receipt of moneys by them from the San Francisco newspapers who are plaintiffs in this action. Will that cover it?

Mr. Fink: I will accept the Court's stipulation.

Mr. Jacobs: The Government agrees to that stipulation. [411]

The Court: Well, that settles that. Now, you can return the exhibit.

Mr. Jacobs: I was about to bring that question up. I would like to have one of those forms in evidence.

Mr. Fink: Substitute a blank form for Mr. Parrish's return.

The Court: Substitute a blank form if you wish, but I see no reason for keeping one of the news vendor's tax returns in the record of this case. I don't see that it serves any purpose.

Mr. Jacobs: It is illustrative of the case. If your Honor desires a blank form——

The Court: You may substitute a blank form, and the particular exhibit may be returned.

Mr. Jacobs: May we have a short recess at this time; your Honor?

The Court: The Court will recess.

(Recess.)

Mr. Jacobs: At this time, if it please the court, the Government rests, and renews its motion for judgment at the close of the plaintiffs' case.

The Court: Is there any rebuttal testimony, or is all the evidence closed?

Mr. Fink: I think, if your Honor please, there is no necessity for any rebuttal. [412]

The Clerk: What shall I do with regard to this exhibit?

The Court: Well, this Defendant's Exhibit, "N" for identification may be returned to whoever produced it in court.

Mr. Jacobs: I will return it to the files of the Collector's office.

The Court: You may furnish a blank form.

Mr. Jacobs: May the record show I am producing a blank form.

The Court: How do you want to submit this matter, gentlemen, by briefs?

Mr. Fink: If your Honor please, I think so far as the plaintiffs are concerned, I would like the opportunity for a short oral argument.

The Court: Well, you both may discuss it for the rest of the morning, and supplement it by written briefs. Is that satisfactory?

Mr. Fink: That is satisfactory.

Mr. Jacobs: Yes, your Honor.

Mr. Fink: Now, what order of procedure shall we take, if your Honor please? Are the respective motions of the Government to be taken under submission and ruled upon at the time the Court makes its ultimate decision?

The Court: Yes.

(Argument by Mr. Fink.)

(Argument by Mr. Ladar.) [413]

Mr. Jacobs: May it please the Court, at this time to substitute a copy of form 1040-A, for the form offered in evidence.

The Court: Very well, it may be given the same exhibit number.

(The document referred to was marked in evidence Defendant's Exhibit N.)

(Argument by Mr. Jacobs.)

The Court: I can see that argument in this case, if we really present it the way you want to on both sides, would require some substantial time. Would you rather argue this case, or would you rather submit a memorandum?

Mr. Fink: So far as I am concerned, I would prefer oral argument to start with. I am perfectly willing to keep within any limits the Court outlines, but I think the case is of sufficient importance to justify oral argument and brief it.

The Court: Would you want a brief, too?

Mr. Fink: Yes, your Honor.

The Court: If there is oral argument, the brief then should be a statement merely of the legal points.

Mr. Fink: Yes, your Honor.

The Court: How do you feel about that, Mr. Jacobs?

Mr. Jacobs: Well, I have prepared a brief prior to coming out here, which was devoted solely to the pleadings. I don't think, as I stated in my opening statement, that the [414] evidence has materially altered what is disclosed by the contract and the pleadings. All I would ask is an opportunity

to reply to Mr. Fink's brief. He can have a copy of this brief at the close of this proceeding.

Mr. Fink: I don't think you understand the Court's question.

The Court: Would you want to argue the matter orally?

Mr. Jacobs: Solely?

The Court: I have no objection to your arguing orally, but if then you are going to file a brief, the brief then should be confined to a statement of the legal points involved rather than a long story of the case.

Mr. Jacobs: I don't know whether this brief is confined to your Honor's idea of the points. It is not tremendously long.

The Court: I am not thinking in terms of length, but I just wanted a statement of the applicable principles. If you are going to orally argue it, the main thing is, if you are going to orally argue. I have to try to find the time for you, and for you to prepare.

Mr. Fink: Your honor, does it not somewhat depend on Counsel's engagements? I understand he was to try some other things, or had some other matter here.

The Court: Are you going to be here some time?

Mr. Jacobs: No, your Honor. I love San Francisco dearly, [415] but I have obligations in the east. I must go back. I planned to leave by airplane this evening if I can.

May I suggest, this brief will help clarify the situation. At the close of the argument, I will file

this brief and suggest that plaintiffs have the opportunity to examine it and reply, and I be given an opportunity to reply to theirs.

The Court: I think the plaintiffs should have the opening. You have made a motion for judgment which takes the whole case under advisement. The plaintiffs have the burden of proof. I think they should have an opportunity to file the opening brief and a reply brief. That will give you an opportunity, as well, to be able to answer what he says.

Mr. Jacobs: If there is any advantage that goes with the opening brief, I will forego it.

The Court: That is the proper procedure. I know you would like to argue the matter, Mr. Fink, but I think this case is going largely, to depend on the question of law. There isn't any real dispute as to the facts of this case. It is a question of what is drawn from the facts that reflects on the question of the status of the parties, rather than the Court having to resolve any question of fact. I think that is a fair statement. It is very difficult, in the pressure of work in this district, with a lot of cases to try, for the Court to keep in mind these oral arguments. I would like to find out about some problems that trouble me. I would [416] prefer that the matter be submitted to me in writing so I could study it over and, as I said to you before, Mr. Jacobs, what I am concerned with, what is bothering me about this case, is the application of this Social Security Act in a case where the parties themselves have dealt with it, and where there is not any conflict apparently between them

as to how far the liberality of the Social Security Act would be carried into the decisions of the Supreme Court. I would like you to take that up in your brief, Counsel.

(Submitted 30-30- and 15.) [417]

Certificate of Reporter

I, W. A. Foster, Official Reporter, certify that the foregoing 177 pages is true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER.

Certificate of Reporter

I, Carolyn Blair, Official Reporter, certify that the foregoing, 240 pages, is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ CAROLYN R. BLAIR.

[Endorsed]: No. 11781. United States Circuit Court of Appeals for the Ninth Circuit. Hearst Publications, Incorporated, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 10, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11781

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR ORDER DISPENSING WITH
THE NECESSITY OF PRINTING EXHIBITS

Appellant moves the court to enter an order dispensing with the necessity of printing the exhibits which were transmitted to the Clerk of the above-mentioned court as a part of the record on appeal, and directing that the exhibits be considered in their original form, and in support thereof states:

1. That a part of the record on appeal in this case consists of voluminous and bulky exhibits which were transmitted to the Clerk of the above-mentioned court in their original form. The same exhibits are by stipulation made a part of the record on appeal in three other cases pending on appeal in said court, namely, *Hearst Publications, Incorporated vs. United States of America*—11782; *The Chronicle Publishing Co. vs. United States of America*—11783; *The Chronicle Publishing Co. vs. United States of America*—11784, the cases having been consolidated for trial in the District Court.

2. Said exhibits are so voluminous and bulky that the printing thereof would entail expense so great as to be almost prohibitive. It is believed that the matter can be presented to the court in the briefs and in oral argument in such manner that undue inconvenience will not result from the fact that the exhibits are not printed.

Dated this 20th day of November, 1947.

CALKINS, HALL, LINFORTH
& CONRAD,

By /s/ REGINALD H. LINFORTH,
/s/ JAMES I. JOHNSON,
Attorneys for Appellant.

State of California,
City and County of San Francisco—ss.

James I. Johnson, being first duly sworn, deposes and says:

That he is one of the attorneys for appellant in the above-entitled action; that he has read the foregoing motion and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be made on information or belief, and as to those matters that he believes it to be true.

/s/ JAMES I. JOHNSON,

Subscribed and sworn to before me this 20th day of November, 1947.

[Seal] /s/ EUGENE P. JONES,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 28, 1947.

[Title of Circuit Court of Appeals and Cause.]

ORDER DISPENSING WITH THE
NECESSITY OF PRINTING EXHIBITS

On motion of appellant, and for good cause shown, it is hereby ordered that the printing of the exhibits transmitted to the Clerk of this court as a part of the record on appeal, which exhibits are also by stipulation made a part of the record on appeal in three other cases pending before this court, namely, *Hearst Publications, Incorporated vs. United States of America*—11782; *The Chronicle Publishing Co. vs. United States of America*—11783; *The Chronicle Publishing Co. vs. United States of America*—11784, be, and the same hereby is, dispensed with, and it is further ordered that the said exhibits shall be considered by this court in their original form to the same extent as if they had been printed.

Dated November 21, 1947.

/s/ FRANCIS A. GARRECHT,
Senior United State Circuit
Judge.

Appellee consents to the granting of the foregoing order.

FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed Nov. 21, 1947.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY, AND
DESIGNATION OF THE PARTS OF THE
RECORD NECESSARY FOR THE CON-
SIDERATION THEREOF

Appellant intends to rely upon each of the following points:

1. The court erred in holding that the news vendors involved were employees of appellant and were not independent contractors.
2. The court erred in the findings of fact upon which its decision was based.
3. The court erred in its conclusions of law.

Appellant designates the entire record on appeal as that which is necessary for the consideration of said points, the exhibits, however, to be considered in their original form.

CALKINS, HALL, LINFORTH
& CONRAD,

By /s/ REGINALD H. LINFORTH,
/s/ JAMES I. JOHNSON,

Attorneys for Appellant.

Received a true copy of the foregoing this 3rd day
of November, 1947.

FRANK J. HENNESSY,
United States Attorney.

By /s/ W. E. LICKING,

[Endorsed]: Filed Nov. 25, 1947.

No. 11782

United States
Circuit Court of Appeals
For the Ninth Circuit.

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

JAN 28 1948

PAUL R. O'BRIEN,
CLERK

No. 11782

United States
Circuit Court of Appeals
For the Ninth Circuit.

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

RETRACTED

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10/10/19

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10/10/19

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	29
Appeal:	
Certificate of Clerk to Transcript of Record	
on	47
Cost Bond on.....	37
Statement of Points Upon Which Appel-	
lant Intends to Rely Upon.....	42
Stipulation as to the Record on.....	43
Notice of.....	37
Order Enlarging Time in Which to File the	
Record on.....	46
Appearances	36
Certificate of Clerk to Transcript of Record on	
Appeal	47
Complaint for Taxes Illegally Collected.....	2
Cost Bond on Appeal.....	37
Judgment	32
Minute Orders:	
January 28, 1946—Consolidating Cases	
25228-G and 25229-G for Trial.....	31
April 29, 1947—Engrossed Findings of	
Fact and Judgments Be Entered in Four	
Cases	34

Motion for Leave to Enter Appearance of Additional Attorneys for Plaintiff.....	35
Consent to Entry of Order.....	35
Names and Addresses of Attorneys.....	1
Notice of Appeal to Circuit Court of Appeals Under Rule 73(b).....	37
Order Enlarging Time in Which to File the Record on Appeal.....	46
Order Extending Time to File the Record on Appeal and Docket the Action on Appeal....	39
Order Granting Leave to Enter Appearances..	36
Order Granting Leave to Withdraw as Attorneys	41
Stipulation as to the Record on Appeal.....	43
Stipulation for Extension of the Time for Filing the Record on Appeal and Docketing the Action	39
Statement of Points Upon Which Appellant Intends to Rely Upon Appeal.....	42
Statement of Points Upon Which Appellant Intends to Rely, and Designation of the Parts of the Record Necessary for the Consideration Thereof.....	48
Summons in a Civil Action.....	28
Withdrawal of Attorneys.....	40
Consent to Withdrawal.....	40

NAMES AND ADDRESSES OF ATTORNEYS

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In the United States District Court for the
Northern District of California, Southern
Division

Civil Action No. 25229-S

HEARST PUBLICATIONS, INCORPORATED, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF TAXES
ILLEGALLY COLLECTED

Plaintiff complains of defendant and for cause
of action alleges:

I.

Plaintiff is, and at all times herein referred to
was, a corporation organized and existing under
and by virtue of the laws of the State of California,
qualified to, and doing business in the Southern
Division of the Northern District of California and
elsewhere, and is a citizen of the United States of
America.

II.

Plaintiff is now and for many years last past and
at all times herein mentioned has been the Owner
and Publisher of the San Francisco Examiner and
the San Francisco Call-Bulletin, each of which is

a daily newspaper published, printed, sold, [1*] circulated and distributed in the City and County of San Francisco, State of California.

III.

This is an action for the recovery of Social Security and Federal Insurance Contributions taxes erroneously and illegally collected under the provisions of Title VIII of the Social Security Act and the Federal Insurance Contributions Act, from plaintiff. It is brought against the United States of America.

IV.

At all times as used herein the term "News Vendor" means a person over the age of eighteen (18) years who purchases newspapers at wholesale from the Plaintiff Publisher and resells the same at retail upon the public streets of the City and County of San Francisco, State of California.

V.

In issuing the Notice and Demands for Tax Due Under the Federal Insurance Contributions Act hereinafter referred to, the Collector of Internal Revenue for the First District of California in each instance simultaneously issued for each period two of such Notices and Demands for Tax Under the Federal Insurance Contributions Act, one of which said Notices and Demands was mailed by said Col-

* Page numbering appearing at foot of page of original certified Transcript of Record.

lector of Internal Revenue to plaintiff at the place of publication in the City and County of San Francisco, State of California, of the San Francisco Examiner and the other of which said Notices and Demands was mailed by said Collector of Internal Revenue to plaintiff at the place of publication in the City and County of San Francisco, State of California, of the San Francisco Call-Bulletin.

VI.

Heretofore, and on or about the 19th day of June, 1941, the Collector of Internal Revenue for the First District of [2] California issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act demanding payment within ten days from said date of the sum of \$450.00 tax, and interest in the sum of \$98.76, a total of \$548.76, and his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act demanding payment within ten days from said date of the sum of \$540.00 tax, and interest in the sum of \$118.56, a total of \$658.56, alleged to be due for the period, April 1, 1937, to December 31, 1937, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Examiner and the San Francisco Call-Bulletin in the City of San Francisco.

VII.

Thereafter, and on or about June 28, 1941, plaintiff paid said sums to the Collector of Internal

Revenue for the First District of California and at the same time filed its written Protests and Claim for Refund of the said sums of \$548.76 and \$658.56. A copy of said written Protests and Claims for Refund are hereunto attached marked Exhibits 1 and 2 and are by this reference made a part hereof. Plaintiff in said written Protests and Claims for Refund stated the grounds of said Protests and the basis of the said Claims for Refund.

VIII.

Thereafter, the Commissioner of Internal Revenue disallowed and rejected the said Claims for Refund and pursuant to the provisions of Section 3772(a)(2) of the Internal Revenue Code the Commissioner of Internal Revenue by registered letter bearing date July 13, 1945, advised plaintiff that said Claims for Refund were disallowed. A copy of the said letter is hereunto attached marked Exhibit 3 and is by this reference made a part hereof.

IX.

That the San Francisco Examiner and the San Francisco [3] Call-Bulletin, each a daily newspaper, for many years last past and at all times herein mentioned have been sold at retail on the public streets of the City and County of San Francisco, State of California, by news vendors. Said news vendors purchase copies of the San Francisco Examiner and the San Francisco Call-Bulletin at wholesale and thereafter sell said newspapers to buyers thereof at the retail sale price of five cents

per copy for each copy of the daily issue of said newspapers and at the established retail sale price for the Sunday issue of said San Francisco Examiner.

X.

At all times herein mentioned the profit to news vendors has been and now is the difference between the wholesale price per 100 copies and the retail sales price per copy charged by said news vendors to the purchasers thereof.

XI.

In the year 1937, the news vendors joined together in an organization and represented to the plaintiff that as an organization they desired to enter into a contract providing, among other things, for the purchase and sale of newspapers in said City. .

Thereafter, after negotiations between plaintiff and said organization, said parties agreed upon the conditions to be incorporated in a contract providing, among other things, for the purchase and sale of newspapers in said City.

Said contract was reduced to writing and on or about August 31, 1937, was signed by plaintiff and the said organization of news vendors. A copy of said contract is hereunto attached marked Exhibit 4 and is by this reference made a part hereof.

XII.

During all of the period of the negotiation of the said [4] contract, Exhibit 4, and at the time of the

execution thereof it was the intent and purpose of the organization of news vendors and of plaintiff to create and maintain as between the news vendors and plaintiff the relationship of buyer and seller and to establish and maintain the news vendors as independent contractors.

XIII.

Subsequent to the execution of the said contract, Exhibit 4, and throughout the term thereof, the said news vendors and plaintiff construed and interpreted said contract as establishing as between said parties the relationship of buyer and seller and construed and interpreted the status of the news vendors under the provisions of said contract as that of independent contractors and not otherwise. Said parties throughout all of the terms of said contract acted with the intent and in the belief that the said contract would be interpreted and construed as intended by said parties.

XIV.

Thereafter, on January 24, 1939, and May 28, 1940, and August 31, 1942, and August 28, 1944, said parties entered into new contracts. Each of said contracts provide, among other things, for the purchase at wholesale and to the sale at retail by said news vendors of newspapers on the streets of the City and County of San Francisco, State of California, and are similar in text, with some modifications, to the contract of August 31, 1937, Ex-

hibit 4, but the terms of none of which subsequent contracts modified or purport to modify in any respect the independent relationship of the parties thereto.

XV.

During all of the period of negotiation of each of [5] the said four contracts subsequent to Exhibit 4, and at the time of the execution of each thereof it was the intent and purpose of the organization of news vendors and of plaintiff to maintain the relationship of buyer and seller and to maintain the status of said news vendors as independent contractors. Said parties during the term of each of said contracts have acted with the intent and in the belief that the said contracts would be interpreted and construed as intended by said parties.

XVI.

That none of the news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin, each a daily newspaper, on the streets of the City and County of San Francisco, State of California, are now and none thereof have at any time been employees of plaintiff. Said news vendors are now and always have been independent contractors purchasing from plaintiff newspapers at a wholesale price per 100 copies and thereafter selling said newspapers at retail to the public at a retail price. That plaintiff neither has nor exercises nor claims to have or exercise any control or

any right to control over the means and methods of said news vendors or any of them in the retail sale of said newspapers to the public on the public streets of the City and County of San Francisco, State of California, and said news vendors are responsible to plaintiff for the results accomplished in the retail sale of said newspapers to the public and on the public streets in said City only.

XVII.

That there is no liability of plaintiff under the Federal Insurance Contributions Act for the sum of \$450.00 tax, and interest in the sum of \$98.76, a total of \$548.76, and/or the sum of \$540.00 tax, and interest in the sum of \$118.56, a total of \$658.56, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner [6] and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, April 1, 1937, to December 31, 1937.

XVIII.

No part of the sum of \$548.76 and the sum of \$658.56, a total of \$1207.32, claimed by plaintiff as a refund as alleged in Paragraph VII hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Federal Insurance Contributions Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, Plaintiff demands judgment against defendant for the sum of \$1207.32, interest and costs.

Count II

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, V, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI of Count I of this complaint.

II.

Heretofore, and on or about the 27th day of January, 1943, the Collector of Internal Revenue for the First District of California issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$150.00 tax, and interest in the sum of \$35.72, a total of \$185.72, and his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$180.00 tax, and interest in the sum of \$42.86, a total of \$222.86, alleged to be due for the period, October 1, 1938, to December 31, 1938, under the provisions of said Act on the assumed or alleged earnings of News Vendors [7] selling the San Francisco Examiner and the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter, and on or about the 5th day of February, 1943, plaintiff paid said sums to the Collector of Internal Revenue for the First District of California, and at the same time filed its written Protests and Claims for Refund of each of the said sums. A copy of said written Protests and Claims for Refund are hereunto attached marked Exhibits 5 and 6 and are by this reference made a part hereof. Plaintiff in said written Protests and Claims for Refund stated the grounds of said Protests and the basis of the said Claims for Refund.

IV.

That there is no liability of Plaintiff under the Federal Insurance Contributions Act for the sums of \$150.00 tax, and interest in the sum of \$35.72, a total of \$185.72, and/or the sum of \$180.00 tax, and interest in the sum of \$42.86, a total of \$222.86, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, October 1, 1938, to December 31, 1938.

V.

No part of the sum of \$222.86, and the sum of \$185.72, a total of \$408.58, claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same or any thereof been

credited upon the admitted liability for Federal Insurance Contributions Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to Plaintiff, and unpaid.

Wherefore, Plaintiff demands judgment against defendant for the sum of \$408.58, interest and costs. [8]

Count III

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, V, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI of Count I of this Complaint.

II.

Heretofore, and on or about the 5th day of May, 1943, the Collector of Internal Revenue for the First District of California issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$150.00 tax, and interest in the sum of \$35.94, a total of \$185.94, and his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$180.00 tax, and interest in the sum of \$43.13, a total of \$223.13, alleged to be due for the period, January 1, 1939, to March 31, 1939, under the provisions of said act on the assumed or alleged earnings of News Ven-

dors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter, and on or about the 14th day of May, 1943, plaintiff paid said sums to the Collector of Internal Revenue for the First District of California, and at the same time filed its written Protests and Claims for Refund of each of the said sums. A copy of said written Protests and Claims for Refund are hereunto attached marked Exhibits 7 and 8 and are by this reference made a part hereof. Plaintiff in said written Protests and Claims for Refund stated the grounds of said Protests and the basis of the said Claims for Refund.

IV.

That there is no liability of Plaintiff under the Federal Insurance Contributions Act for the sums of \$150.00 tax, and interest in the sum of \$35.94, a total of \$185.94, and/or the sum of \$180.00 tax, and interest in the sum of \$43.13, a total of \$223.13, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, January 1, 1939, to March 31, 1939.

V.

No part of the sum of \$185.94, and the sum of \$223.13, a total of \$409.07, claimed by plaintiff as

a refund as alleged in Paragraph III hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Federal Insurance Contributions Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to Plaintiff, and unpaid.

Wherefore, Plaintiff demands judgment against defendant for the sum of \$409.07, interest and costs.

Count IV

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, V, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI of Count I of this Complaint.

II.

Heretofore, and on or about the 29th day of July, 1943, the Collector of Internal Revenue for the First District of California issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$150.00 tax, and interest in the sum of \$35.77, a total of \$185.77, and his notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within [10] ten days from said date of the sum of \$180.00 tax, and interest in the sum of \$42.92, a total of \$222.92, alleged to be due for the period, April 1, 1939, to

June 30, 1939, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter, and on or about the 7th day of August, 1943, plaintiff paid said sums to the Collector of Internal Revenue for the First District of California, and at the same time filed its written Protests and Claims for Refund of each of the said sums. A copy of said written Protests and Claims for Refund are hereunto attached marked Exhibits 9 and 10 and are by this reference made a part hereof. Plaintiff in said written Protests and Claims for Refund stated the grounds of said Protests and the basis of the said Claims for Refund.

IV.

That there is no liability of Plaintiff under the Federal Insurance Contributions Act for the sums of \$150.00 tax, and interest in the sum of \$35.77, a total of \$185.77, and/or the sum of \$180.00 tax, and interest in the sum of \$42.92, a total of \$222.92, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, April 1, 1939, to June 30, 1939.

V.

No part of the sum of \$185.77, and the sum of \$222.92, a total of \$408.69, claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Federal Insurance Contributions Tax of Plaintiff and the whole thereof, [11] together with interest thereon as allowed by law is wholly due and owing from defendant to Plaintiff, and unpaid.

Wherefore, Plaintiff demands judgment against defendant for the sum of \$408.69, interest and costs.

Count V

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, V, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI of Count I of this Complaint.

II.

Heretofore, and on or about the 3rd day of November, 1943, the Collector of Internal Revenue for the First District of California issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$150.00 tax, and interest in the sum of \$35.87, a total of \$185.87, and his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten

days from said date of the sum of \$180.00 tax, and interest in the sum of \$43.04, a total of \$223.04, alleged to be due for the period, July 1, 1939, to September 30, 1939, under the provisions of said act on the assumed or alleged earnings of News Vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter, and on or about the 13th day of November, 1943, plaintiff paid said sums to the Collector of Internal Revenue for the First District of California, and at the same time filed its written Protests and Claims for Refund of each of the said sums. A copy of said written Protests and Claims for Refund are hereunto attached marked Exhibits 11 and 12 and are by this reference made a part hereof. Plaintiff in said written [12] Protests and Claims for Refund stated the grounds of said Protests and the basis of the said Claims for Refund.

IV.

That there is no liability of Plaintiff under the Federal Insurance Contributions Act for the sums of \$150.00 tax, and interest in the sum of \$35.87, a total of \$185.87, and/or the sum of \$180.00 tax, and interest in the sum of \$43.04, a total of \$223.04, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin

in the City and County of San Francisco, State of California, for and during the period, July 1, 1939, to September 30, 1939.

V.

No part of the sum of \$185.87, and the sum of \$223.04, a total of \$408.91, claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Federal Insurance Contributions Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff, and unpaid.

Wherefore, Plaintiff demands judgment against defendant for the sum of \$408.91, interest and costs.

Count VI

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, V, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI of Count I of this Complaint.

II.

Heretofore, and on or about the 8th day of February, 1944, the Collector of Internal Revenue for the First District of California issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions [13] Act, demanding payment within ten days from said date of the sum of \$150.00 tax, and interest in the sum

of \$35.96, a total of \$185.96, and his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$180.00 tax, and interest in the sum of \$43.04, a total of \$223.04, alleged to be due for the period, October 1, 1939, to December 31, 1939, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter, and on or about the 18th day of February, 1944, plaintiff paid said sums to the Collector of Internal Revenue for the First District of California, and at the same time filed its written Protests and Claims for Refund of each of the said sums. A copy of said written Protests and Claims for Refund are hereunto attached marked Exhibits 13 and 14 and are by this reference made a part hereof. Plaintiff in said written Protests and Claims for Refund stated the grounds of said Protests and the basis of the said Claims for Refund.

IV.

That there is no liability of Plaintiff under the Federal Insurance Contributions Act for the sums of \$150.00 tax, and interest in the sum of \$35.96, a total of \$185.96, and/or the sum of \$180.00 tax, and interest in the sum of \$43.04, a total of \$223.04, or any other sum, upon the assumed or alleged

earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, October 1, 1939, to December 31, 1939.

V.

No part of the sum of \$185.96, and the sum of \$223.04, a total of \$409.00, claimed by plaintiff as a refund [14] as alleged in Paragraph III hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Federal Insurance Contributions Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff, and unpaid.

Wherefore, Plaintiff demands judgment against defendant for the sum of \$409.00, interest and costs.

Count VII

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, V, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI of Count I of this Complaint.

II.

Heretofore, and on or about the 4th day of May, 1944, the Collector of Internal Revenue for the First District of California issued and sent to plaintiff his Notice and Demand for Tax Due Under the

Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$150.00 tax, and interest in the sum of \$35.89, a total of \$185.89, and his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$180.00 tax, and interest in the sum of \$43.07, a total of \$223.07, alleged to be due for the period, January 1, 1940, to March 31, 1940, under the provisions of said Act on the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter, and on or about the 13th day of May, 1944, plaintiff paid said sums to the Collector of Internal Revenue for the First District of California, and at the same time filed its written Protests and Claims for Refund of each of the said [15] sums. A copy of said written Protests and Claims for Refund are hereunto attached marked Exhibits 15 and 16 and are by this reference made a part hereof. Plaintiff in said written Protests and Claims for Refund stated the grounds of said Protests and the basis of the said Claims for Refund.

IV.

That there is no liability of Plaintiff under the Federal Insurance Contributions Act for the sums of \$150.00 tax, and interest in the sum of \$35.89, a total of \$185.89, and/or the sum of \$180.00 tax,

and interest in the sum of \$43.07, a total of \$223.07, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, January 1, 1940, to March 31, 1940.

V.

No part of the sum of \$185.89, and the sum of \$223.07, a total of \$408.96, claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Federal Insurance Contributions Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to Plaintiff, and unpaid.

Wherefore, Plaintiff demands judgment against defendant for the sum of \$408.96, interest and costs.

Count VIII

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, V, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI of Count I of this Complaint.

II.

Heretofore, and on or about the 4th day of August, [16] 1944, the Collector of Internal Rev-

enue for the First District of California issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$150.00 tax, and interest in the sum of \$35.89, a total of \$185.89, and his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$180.00 tax, and interest in the sum of \$43.07, a total of \$223.07, alleged to be due for the period, April 1, 1940, to June 30, 1940, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter, and on or about the 14th day of August, 1944, plaintiff paid said sums to the Collector of Internal Revenue for the First District of California, and at the same time filed its written Protests and Claims for Refund of each of the said sums. A copy of said written Protests and Claims for Refund are hereunto attached marked Exhibits 17 and 18 and are by this reference made a part hereof. Plaintiff in said written Protests and Claims for Refund stated the grounds of said Protests and the basis of the said Claims for Refund.

IV.

That there is no liability of Plaintiff under the Federal Insurance Contributions Act for the sums

of \$150.00 tax, and interest in the sum of \$35.89, a total of \$185.89, and/or the sum of \$180.00 tax, and interest in the sum of \$43.07, a total of \$223.07, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City [17] and County of San Francisco, State of California, for and during the period, April 1, 1940, to June 30, 1940.

V.

No part of the sum of \$185.89, and the sum of \$223.07, a total of \$408.96, claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Federal Insurance Contributions Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff, and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$408.96, interest and costs.

Count IX

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, V, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI of Count I of this Complaint.

II.

Heretofore, and on or about the 26th day of January, 1945, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$324.00 tax, and interest in the sum of \$77.10, a total of \$401.10, and his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act, demanding payment within ten days from said date of the sum of \$388.00 tax, and interest in the sum of \$92.32, a total of \$480.32, alleged to be due for the period, October 1, 1940, to December 31, 1940, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City of San Francisco. [18]

III.

Thereafter, and on or about the 3rd day of February, 1945, plaintiff paid said sums to the Collector of Internal Revenue for the First District of California, and at the same time filed its written Protests and Claims for Refund of each of the said sums. A copy of said written Protests and Claims for Refund are hereunto attached marked Exhibits 19 and 20 and are by this reference made a part hereof. Plaintiff in said written Protests and Claims for Refund stated the grounds of said Protests and the basis of the said Claims for Refund.

IV.

That there is no liability of plaintiff under the Federal Insurance Contributions Act for the sums of \$324.00 tax, and interest in the sum of \$77.10, a total of \$401.10, and/or the sum of \$388.00 tax, and interest in the sum of \$92.32, a total of \$480.32, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, October 1, 1940, to December 31, 1940.

V.

No part of the sum of \$401.10, and the sum of \$480.32, a total of \$881.42, claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Federal Insurance Contributions Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff, and unpaid.

Wherefore, Plaintiff demands judgment against defendant for the sum of \$881.42, interest and costs.

That by reason of the premises, plaintiff is entitled to judgment against defendant for the aggregate sum of \$4,950.91, [19] together with interest as prayed in each cause of action hereinabove pleaded, as provided by law; for costs of suit, and

for such other relief as to the Court may seem meet and just.

Dated, San Francisco, California, October 11, 1945.

FINK & KEYSTON,
By /s/ GROVE J. FINK,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss.

Clarence R. Lindner, being first duly sworn, deposes and says:

That he is Vice-President of Hearst Publications, Incorporated, the plaintiff named herein; that he has read the above and foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes them to be true.

/s/ CLARENCE R. LINDNER.

Subscribed and sworn to before me this 11th day of October, 1945.

[Seal] /s/ KATHARINE T. McDONNELL,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 11, 1945. [20]

Note

The exhibits attached to the complaint are identical with exhibits offered in evidence. The follow-

ing table shows the exhibit number in the complaint and the corresponding exhibit number of the same document as introduced in evidence.

Exhibit Number In Complaint	Plaintiff's Exhibit Number in Evidence
1 through 20	1 through 20

District Court of the United States for the
Northern District of California, Southern
Division

Civil Action File No. 25229-S

HEARST PUBLICATIONS, INCORPORATED, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Messrs. Fink & Keyston, plaintiff's attorneys, whose address is 1018 Hearst Bldg., San Francisco, Calif., an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default

will be taken against you for the relief demanded in the complaint.

[Seal]

C. W. CALBREATH,

Clerk of Court.

By WM. J. CROSBY,

Deputy Clerk.

Date: October 11, 1945.

[Return on service of writ.]

[Endorsed]: Filed Oct. 18, 1945. C. W. Calbreath, Clerk. Received Oct. 16, 1945, U. S. Marshal's Office, San Francisco, Calif., Civil 26747. [22]

[Title of District Court and Cause.]

ANSWER

For answer to the complaint filed herein, defendant states as follows:

1. Defendant admits the allegations of paragraphs I, II, V, VII and VIII of Count I and paragraph III in each of Counts I, III, and V to IX, inclusive, of the complaint.

2. Defendant denies the allegations of paragraphs X, XVI, XVII and XVIII of Count I and paragraphs IV and V in each of Counts II to IX, inclusive, of the complaint.

3. Defendant has no knowledge or information sufficient to form a belief as to the truth of the

allegations of paragraphs IV, XII, XIII, XIV and XV of Count I of the complaint and therefore denies every allegation therein.

4. Answering paragraph VI of Count I and paragraph II in each of Counts II to IX, inclusive, of the complaint, defendant admits the allegations thereof, except that defendant denies that the tax therein referred to was based on the assumed or alleged earnings of news vendors selling the San Francisco Examiner and the San Francisco Call-Bulletin in the City of San Francisco, and alleges that said tax was measured by the remuneration received by said vendors as employees of the plaintiff in the sale of said newspapers.

5. Answering paragraph IX of Count I of the complaint, defendant admits the allegations of the first sentence thereof [23] and denies the allegations of the second sentence thereof.

6. Answering paragraph XI of Count I of the complaint, defendant admits that Exhibit 4 to the complaint is a true copy of a document executed by the persons whose signatures are subscribed thereto, but denies every other allegation therein.

7. Answering paragraph I in each of Counts II to IX, inclusive, of the complaint, defendant incorporates by reference its answer to the paragraphs of the complaint therein referred to.

8. Answering paragraph III of Count II of the complaint, defendant admits the allegations therein except with respect to the date of February

5, 1943, which is denied and is alleged to be February 6, 1943.

9. Answering paragraph III of Count IV of the complaint, defendant admits the allegations therein except with respect to the date of August 7, 1943, which is denied and is alleged to be August 9, 1943.

Wherefore, defendant prays that judgment be entered against plaintiff for costs and all other proper relief.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Jan. 15, 1946. [24]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 28th day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

Minute Order of January 28, 1946

[Title of Causes.]

ORDER CONSOLIDATING CASES 25228-G
AND 25229-G FOR TRIAL

The two above-entitled cases came on regularly this day for hearing of motion to set for trial in each case. After hearing G. D. Keyston, Esq., attorney for plaintiff, and E. Bonsall, Esq., Assistant U. S. Attorney, it is Ordered that said cases be consolidated for trial on March 28, 1946 (Court).

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25229-S

HEARST PUBLICATIONS, INCORPORATED, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause coming on for trial, both parties appearing by counsel, and having been submitted to the court for trial without a jury and the court now here after hearing all the evidence adduced and being fully advised in the premises, and having

made its findings of fact and conclusions of law, finds the issues for the defendant.

Therefore, it is hereby ordered, adjudged and decreed that the plaintiff take nothing; that the action be and it is hereby dismissed on the merits; that the defendant have and recover from the plaintiff its costs in the action, and that the defendant have execution therefor.

LOUIS E. GOODMAN,
District Judge.

Entered April 28th, 1947.

[Endorsed]: Lodged 2/17/47. Filed and entered April 29, 1947. [26]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 29th day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

Civ. No. 25230-G, The Chronicle Publishing Co.,
etc., vs. United States;

Civ. No. 25231-G, The Chronicle Publishing Co.,
etc., vs. United States;

Civ. No. 25228-G, Hearst Publications, Inc., etc.,
vs. United States;

Civ. No. 25229-G, Hearst Publications, Inc., etc.,
vs. United States.

Minute Order of April 29, 1947

**ORDER THAT ENGROSSED FINDINGS AND
JUDGMENTS BE FILED AND ENTERED**

These cases heretofore having been tried before the Court sitting without a jury, and the Court having found in favor of the defendant upon findings of fact and conclusions of law and the defendant having submitted proposed findings and the plaintiffs having submitted proposed amendments thereto, and the Court thereafter having ordered the proposed findings submitted by the defendant engrossed, and the proposed findings thereafter having been engrossed, it is Ordered that said engrossed findings and the judgments herein be filed and entered in the form presented and signed.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 25229-G

HEARST PUBLICATIONS, INCORPORATED, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR LEAVE TO ENTER APPEARANCE OF ADDITIONAL ATTORNEYS FOR PLAINTIFF

Plaintiff moves the court to enter an order permitting Reginald H. Linforth and James I. Johnson to file their appearance as additional attorneys for the plaintiff.

GROVE J. FINK,
FINK & KEYSTON,
By GROVE J. FINK,
Attorneys for Plaintiff.

Consent to Entry of Order

Consent is hereby given to the entry of the order requested in the foregoing motion, without notice.

Dated July 11, 1947.

/s/ FRANK J. HENNESSY,
Attorney for Defendant.

By C. ELMER COLLETT,
Asst. U. S. Attorney.

[Endorsed]: Filed July 14, 1947. [28]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO ENTER
APPEARANCES

On motion of plaintiff, and pursuant to the consent of defendant, leave is hereby granted Reginald H. Linforth and James I. Johnson to file their respective appearances in the above entitled action as additional attorneys for plaintiff therein.

Dated July 14, 1947.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed July 14, 1947. [29]

[Title of District Court and Cause.]

APPEARANCES

The undersigned, Reginald H. Linforth and James I. Johnson, in pursuance of an order of the above entitled court, granting them leave so to do, hereby enter their respective appearances as additional attorneys for plaintiff in the above entitled action.

Dated July 14, 1947.

REGINALD H. LINFORTH,
910 Crocker Building,
San Francisco, California,
Sutter 4815.

JAMES I. JOHNSON,
910 Crocker Building,
San Francisco, California,
Sutter 4815.

[Endorsed]: Filed July 14, 1947. [30]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Hearst Publications, Incorporated, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947.

GROVE J. FINK,
FINK & KEYSTON,
By GROVE J. FINK,
REGINALD H. LINFORTH,
JAMES I. JOHNSON,
Attorneys for appellant
Hearst Publications,
Incorporated.

Of Counsel:

Calkins, Hall, Linforth & Conard

[Endorsed]: Filed July 21, 1947. [31]

[Title of District Court and Cause.]

COST BOND ON APPEAL

The premium on this bond is \$10 per annum.

Whereas, the plaintiff in the above entitled action is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment entered against it in said action in the District Court of the United States, for the Northern District of California, Southern Division, in

favor of the defendant in said action, on the 29th day of April, 1947.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against it on the appeal or on a [32] dismissal thereof not exceeding the sum of \$250.00, to which amount it acknowledges itself bound.

In Witness Whereof the corporate seal and name of the said surety company is hereto affixed and attested at San Francisco, California, by its duly authorized officer this 18th day of July, 1947.

In case of a breach of any condition hereof the above entitled court may, upon notice to said Maryland Casualty Company, surety hereunder, of not less than ten days, proceed summarily in the above entitled action or proceeding to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment against said surety and award execution therefor.

[Seal]

MARYLAND CASUALTY
COMPANY,

By /s/ H. M. VREELAND, JR.,
Attorney in Fact.

[Endorsed]: Filed July 21, 1947. [33]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF THE
TIME FOR FILING THE RECORD ON
APPEAL AND DOCKETING THE ACTION

It Is Hereby Stipulated by and between the parties hereto, through their respective attorneys of record:

That an order may be entered extending the time for filing the record on appeal and docketing the action on the appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947, notice of which appeal has been filed by plaintiff.

Dated August 20, 1947.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY,

U. S. Attorney,

Attorney for Defendant.

[Endorsed]: Filed Aug. 21, 1947. [34]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE THE
RECORD ON APPEAL AND DOCKET
THE ACTION ON APPEAL

Pursuant to the stipulation of the parties hereto, it is hereby ordered that the time for filing the

record on appeal and docketing the action on the appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947, notice of which appeal has been filed by plaintiff, be, and the same hereby is, extended to and including October 18, 1947.

Dated August 21st, 1947.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Aug. 21, 1947. [35]

[Title of District Court and Cause.]

WITHDRAWAL OF ATTORNEYS

Whereas, Grove J. Fink, of the firm of Fink & Keyston, died on the 23rd day of July, 1947, said firm, with the consent of plaintiff appended hereto, hereby withdraws as attorneys for plaintiff in the above entitled action.

Dated August 19, 1947.

FINK & KEYSTON,
By /s/ GARTON D. KEYSTON.

Consent to Withdrawal

Hearst Publications, Incorporated, hereby consents to the withdrawal of Fink & Keyston as its attorneys in the above entitled action, leaving Regi-

nald H. Linforth and James I. Johnson as its sole attorneys in said action.

Dated August 19, 1947.

HEARST PUBLICATIONS,
INCORPORATED,
By /s/ CLARENCE LINDNER.

[Endorsed]: Filed Aug. 21, 1947. [36]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO WITHDRAW
AS ATTORNEYS

Pursuant to the consent of plaintiff filed herein, leave is hereby given to Messrs. Fink & Keyston to withdraw as attorneys for the plaintiff in the above entitled action.

Dated, August 21st, 1947.

LOUIS E. GOODMAN,
U. S. District Judge.

Consent is hereby given to the granting of the foregoing order without notice.

/s/ FRANK J. HENNESSY,
U. S. Atty.,
Attorneys for Defendant.

/s/ REGINALD H. LINFORTH,
/s/ JAMES I. JOHNSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 21, 1947. [37]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON
WHICH APPELLANT INTENDS TO
RELY UPON APPEAL

Appellant intends to rely upon each of the following points:

1. The court erred in holding that the news vendors involved were employees of plaintiff and were not independent contractors.
2. The court erred in the findings of fact upon which its decision was based.
3. The court erred in its conclusions of law.

/s/ REGINALD H. LINFORTH,
/s/ JAMES I. JOHNSON,
Attorneys for Appellant.

Received a true copy of the foregoing this 24th day of September, 1947.

WILLIAM I. LICKING,
Asst. U. S. Attorney,
Attorney for Appellee.

[Endorsed]: Filed Sept. 24, 1947. [38]

[Title of District Court and Cause.]

STIPULATION AS TO THE RECORD
ON APPEAL

It is hereby stipulated by and between the parties hereto, through their respective attorneys of record:

1. That the following are designated as the parts of the record, proceedings and evidence to be included in the record on appeal:

(a) The complaint.

(b) The summons.

(c) The answer to the complaint.

(d) Order relative to consolidation and setting case for trial on March 28, 1946, entered January 28, 1946.

(e) Motion for judgment on pleadings filed March 22, 1946.

(f) Order consolidating for trial cases Nos. 25228, 25229, 25230, and 25231, entered March 28, 1946. [39]

(g) Motion for judgment, filed April 2, 1946.

(h) A complete transcript of all the evidence and proceedings.

(i) All exhibits identified, offered or introduced in evidence, being plaintiff's Exhibits Nos. 1 through 53, both inclusive, and defendant's Exhibits A through Z, both inclusive, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ.

(j) Order submitting case, entered July 29, 1946.

(k) Order that judgment be for defendant upon findings to be presented, entered January 2, 1947.

(l) Opinion, filed January 2, 1947.

(m) Defendant's request for findings, filed January 28, 1947.

(n) Stipulation extending time to file objections, amendments and additions to findings, filed February 7, 1947.

(o) Plaintiff's objections and suggestions for amendments and additions to findings, filed February 18, 1947.

(p) Order settling findings of fact and conclusions of law, filed February 27, 1947.

(q) Findings, filed April 29, 1947.

(r) Judgment, filed April 29, 1947, together with order that findings and judgment be entered and filed, entered April 29, 1947.

(s) Motion relative to appearances, filed July 14, 1947.

(t) Order permitting additional appearances, filed July 14, 1947.

(u) Appearance of Reginald H. Linforth and James I. Johnson, filed July 14, 1947.

(v) Notice of Appeal, filed July 21, 1947.

(w) Cost Bond on Appeal, filed July 21, 1947.

(x) Withdrawal of Attorneys, filed August 21, 1947.

(y) Order Granting Leave to Fink & Keyston to Withdraw as Attorneys, filed August 21, 1947.

(z) Stipulation, filed August 21, 1947.

(aa) Order Extending Time to File Record on Appeal and Docket the Action, filed August 21, 1947. [40]

(bb) Statement of Points on which Appellant Intends to Rely upon Appeal.

(cc) This Stipulation as to the Record on Appeal.

2. That those parts of the record, proceedings and evidence described in items 1(e)-1(q), both inclusive, are identical with those parts of the record, proceedings and evidence described in items 1(e)-1(q) of the Stipulation as to the Record on Appeal in case No. 25228 (the cases being consolidated for trial); that copies thereof need not be sent up with the record on appeal in this case, but that the copies or originals thereof included in the record on appeal in case No. 25228 shall be incorporated by reference in the record on appeal in this case.

Dated September 18, 1947.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY,

U. S. Attorney,

/s/ W. E. LICKING,

Asst. U. S. Atty.,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 24, 1947. [41]

In the United States Circuit Court of Appeals
for the Ninth Circuit

District Court No. 25229-G

HEARST PUBLICATIONS, INCORPORATED, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER ENLARGING THE TIME IN WHICH
TO FILE THE RECORD ON APPEAL

On motion of appellant, and for good cause shown, the time in which the appellant may file the record on appeal and docket the action on appeal in the above-entitled case, numbered 25229-G in the District Court of the United States for the Northern District of California, Southern Division, is hereby extended to and including November 18, 1947.

Dated this 16th day of October, 1947.

WILLIAM DENMAN,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

A true copy.

Attest: Oct. 16, 1947.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Oct. 16, 1947. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Oct. 17, 1947. C. W. Calbreath, Clerk. [42]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 42 pages, numbered from 1 to 42, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Hearst Publications, Incorporated, a corporation, vs. United States of America, Defendant, No. 25229-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$7.10 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of November, A. D. 1947.

[Seal] C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk. [43]

[Endorsed]: No. 11782. United States Circuit Court of Appeals for the Ninth Circuit. Hearst Publications, Incorporated, a corporation, Appellant, vs. United States of America, Appellee.

Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 10, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11782

HEARST PUBLICATIONS, INCORPORATED, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY, AND
DESIGNATION OF THE PARTS OF THE
RECORD NECESSARY FOR THE CON-
SIDERATION THEREOF

Appellant intends to rely upon each of the following points:

1. The court erred in holding that the news

vendors involved were employees of appellant and were not independent contractors.

2. The court erred in the findings of fact upon which its decision was based.

3. The court erred in its conclusions of law.

Appellant designates the entire record on appeal as that which is necessary for the consideration of said points, the exhibits, however, to be considered in their original form.

CALKINS, HALL, LINFORTH
& CONARD,

By /s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Appellant.

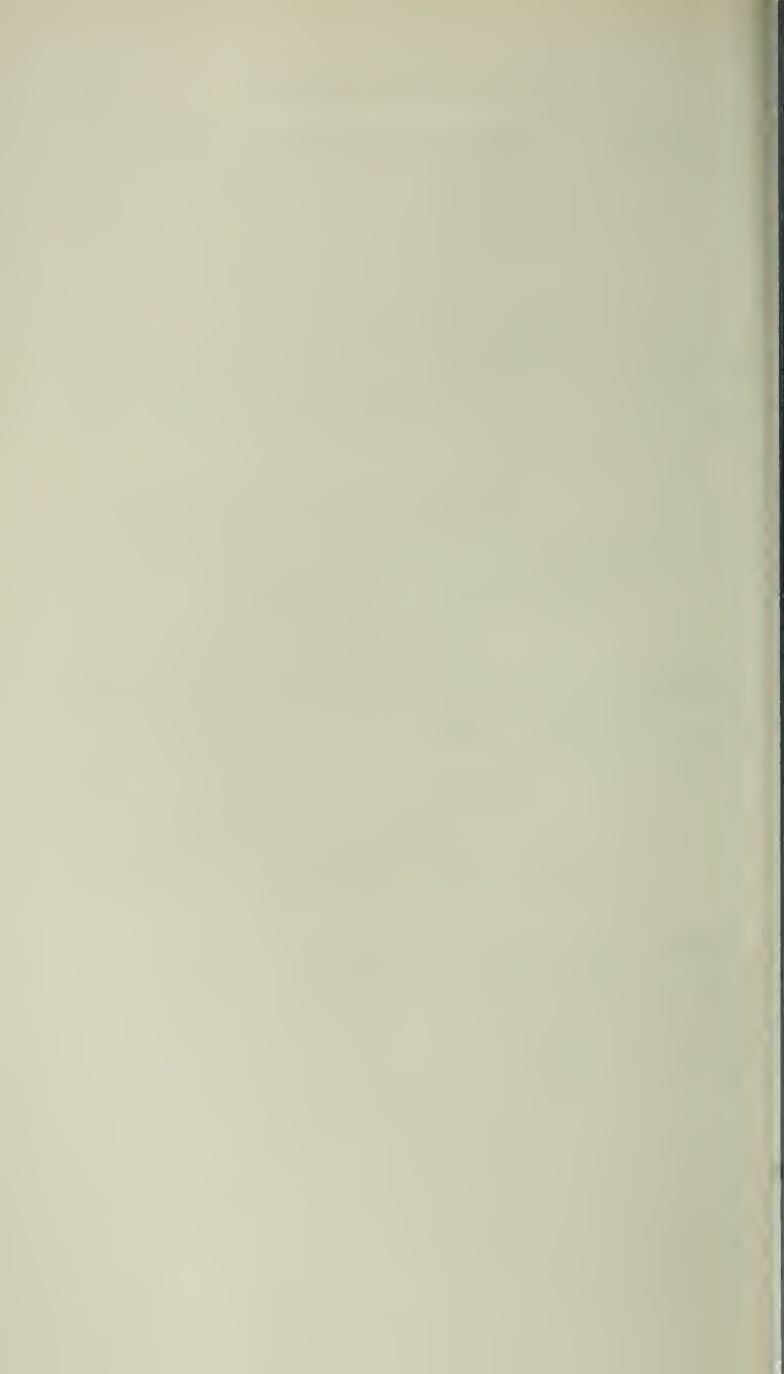
Received a true copy of the foregoing this 25th day of November, 1947.

FRANK J. HENNESSY,
United States Attorney.

By /s/ W. E. LICKING,

Asst. U. S. Atty.

[Endorsed]: Filed Nov. 25, 1947.



No. 11783

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE CHRONICLE PUBLISHING COMPANY,
a Corporation,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JAN 28 1948

PAUL R. O'BRIEN,
CLERK

No. 11783

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CHRONICLE PUBLISHING COMPANY,
a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	13
Appeal:	
Certificate of Clerk to Transcript of Record on.....	31
Cost Bond on.....	21
Notice of.....	20
Order Extending Time to File the Record on Appeal and Docket the Action on....	24
Order Enlarging the Time in Which to File the Record on.....	24
Statement of the Points Upon Which Appellant Intends to Rely Upon.....	26
Stipulation as to the Record on.....	27
Appearances	20
Certificate of Clerk to Transcript of Record on Appeal	31
Complaint for Refund of Taxes Illegally Collected	2
Cost Bond on Appeal.....	21
Judgment	16
Minute Orders:	
January 28, 1946—Setting Cases for Trial.	15
April 29, 1947—That Engrossed Findings and Judgments Be Filed and Entered...	17

Motion for Leave to Enter Appearance of Additional Attorneys for Plaintiff.....	18
Consent to Entry of Order.....	19
Names and Addresses of Attorneys.....	1
Notice of Appeal to Circuit Court of Appeals Under Rule 73(b).....	20
Order Extending Time to File the Record on Appeal and Docket the Action on Appeal....	24
Order Enlarging the Time in Which to File the Record on Appeal.....	30
Order Granting Leave to Enter Appearances..	19
Order Granting Leave to Withdraw as Attorneys	25
Statement of the Points Upon Which Appellant Intends to Rely Upon Appeal.....	26
Statement of Points Upon Which Appellant Intends to Rely, and Designation of the Parts of the Record Necessary for the Consideration Thereof.....	32
Stipulation for Extension of the Time for Filing the Record on Appeal and Docketing the Action	23
Stipulation as to the Record on Appeal.....	27
Summons in a Civil Action.....	12
Withdrawal of Attorneys.....	24
Consent to Withdrawal.....	25

NAMES AND ADDRESSES OF ATTORNEYS

REGINALD H. LINFORTH,
JAMES I. JOHNSON and
CALKINS, HALL, LINFORTH & CONARD,

910 Crocker Building,
San Francisco, California,
Attorneys for Plaintiff and Appellant.

FRANK J. HENNESSY,
United States Attorney,
Northern District of California.
Post Office Building,
San Francisco, California.

In the United States District Court, for the
Northern District of California, Southern
Division

Civil Action No. 25230-G

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF TAXES
ILLEGALLY COLLECTED

Plaintiff complains of defendant and for cause
of action alleges:

I.

Plaintiff is, and at all times herein referred to
was, a corporation organized and existing under
and by virtue of the laws of the State of California
qualified to, and doing business in the Southern
Division of the Northern District of California and
elsewhere, and is a citizen of the United States of
America.

II.

Plaintiff is now and for many years last past and
at all times herein mentioned has been the owner
and publisher of The San Francisco Chronicle, a
daily newspaper, published, sold, printed, circulated

and distributed in the City and County of San Francisco, State of California. [1*]

III.

This is an action for the recovery of Social Security and Federal Unemployment Taxes erroneously and illegally collected under the provisions of Title IX of the Social Security and the Federal Unemployment Tax Acts, from plaintiff. It is brought against the United States of America.

IV.

At all times as used herein the term "News Vendor" means a person over the age of eighteen years who purchases newspapers at wholesale from the plaintiff Publisher and resells the same at retail upon the public streets in the City and County of San Francisco, State of California.

V.

Heretofore, and on or about the 9th day of February, 1942, the Collector of Internal Revenue for the First District of California issued and sent to plaintiff his Notice and Demand for Tax Due under Title IX of the Social Security Act, demanding payment within ten days from said date of the sum of \$340.00 tax, and interest in the sum of \$81.60, a total of \$421.60, alleged to be due for the period, January 1, 1937 to December 31, 1937, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Chronicle in the City of San Francisco.

*Page numbering appearing at foot of page of original certified Transcript of Record.

VI.

Thereafter, and on or about February 18, 1945, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written protest and claim for refund of the said sum of \$421.60. A copy of said written protest and claim for refund is hereunto attached marked Exhibit "1" and is by this reference made a part hereof. Plaintiff in said written protest and claim for refund stated the grounds of said protest and the basis of the said claim for refund. [2]

VII.

Thereafter the Commissioner of Internal Revenue disallowed and rejected the said claim for refund and pursuant to the provisions of Section 3772 (a) (2) of the Internal Revenue Code the Commissioner of Internal Revenue by registered letter bearing date July 13, 1945, advised plaintiff that said claim for refund was disallowed. A copy of the said letter is hereunto attached marked Exhibit "2" and is by this reference made a part hereof.

VIII.

That the San Francisco Chronicle, a daily newspaper, for many years last past and at all times herein mentioned has been sold at retail on the public streets of the City and County of San Francisco, State of California, by news vendors. Said news vendors purchase copies of the San Francisco Chronicle at a wholesale rate per 100 copies and thereafter sell said newspapers to buyers thereof at

the retail sale price of five cents per copy for each copy of the daily issue of said newspaper and at the established retail sale price for the Sunday issue of said newspaper.

IX.

At all times herein mentioned the profit to the news vendors has been and now is the difference between the wholesale price per 100 copies and the retail sales price per copy charged by said news vendors to the purchasers thereof.

X.

In the year 1937 the news vendors joined together in an organization and represented to the plaintiff that as an organization they desired to enter into a contract providing, among other things, for the purchase and sale of newspapers in said City.

Thereafter, after negotiations between plaintiff and said organization, said parties agreed upon the conditions to be incorporated in a contract providing, among other things, for the purchase and sale of newspapers in said city. Said contract was reduced to writing and on or about August 31, 1937, was signed by plaintiff and the said organization of news vendors. A copy of said contract is hereunto attached marked Exhibit "3" and is by this reference made a part hereof.

XI.

During all of the period of the negotiation of the said contract, Exhibit 3, and at the time of the exe-

ention thereof it was the intent and purpose of the organization of news vendors and of plaintiff to create and maintain as between the news vendors and plaintiff the relationship of buyer and seller and to establish and maintain the news vendors as independent contractors.

XII.

Subsequent to the execution of the said contract, Exhibit 3, and throughout the term thereof, the said vendors and plaintiff construed and interpreted said contract as establishing as between said parties the relationship of buyer and seller and construed and interpreted the status of the news vendors under the provisions of said contract as that of independent contractors and not otherwise. Said parties throughout all of the term of said contract acted with the intent and in the belief that the said contract would be interpreted and construed as intended by said parties.

XIII.

Thereafter on January 24, 1939 and May 28, 1940 and August 31, 1942 and August 28, 1944 said parties entered into new contracts. Each of said contracts provide, among other things, for the purchase at wholesale and to the sale at retail by said news vendors of newspapers on the streets of the City and County of San Francisco, State of California, and are similar in text, with some modifications, to the contract of August 31, 1937, Exhibit 3, but the terms

of none of which subsequent contracts modified or purport to modify in any respect the independent relationship of the parties thereto. [4]

XIV.

During all of the period of negotiation of each of the said four contracts subsequent to Exhibit 3, and at the time of the execution of each thereof it was the intent and purpose of the organization of news vendors and of plaintiff to maintain the relationship of buyer and seller and to maintain the status of said news vendors as independent contractors. Said parties during the term of each of said contracts have acted with the intent and in the belief that the said contracts would be interpreted and construed as intended by said parties.

XV.

That none of the news vendors selling the San Francisco Chronicle, a daily newspaper, on the streets of the City and County of San Francisco, State of California, are now and none thereof have at any time been employees of plaintiff. Said news vendors are now and always have been independent contractors purchasing from plaintiff newspapers at a wholesale price per 100 copies and thereafter selling said newspapers at retail to the public at a retail price.

That plaintiff neither has nor exercises nor claims to have or exercise any control or any right to control over the means and methods of said news ven-

dors or any of them in the retail sale of said newspapers to the public on the public streets of the City and County of San Francisco, State of California, and said news vendors are responsible to plaintiff for the results accomplished in the retail sale of said newspapers to the public and on the public streets in said City only.

XVI.

That there is no liability of plaintiff under Title IX of the Social Security Act for the sum of \$340.00 tax, and interest in the sum of \$81.60, a total of \$421.60, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the period, January 1, 1937 to December 31, 1937.

XVII.

No part of the sum of \$421.60 claimed by plaintiff as a refund as alleged in Paragraph VI hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Social Security and/or Federal Unemployment Tax of plaintiff and the whole thereof together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$421.60, interest and costs.

Count II

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this Complaint.

II.

Heretofore, and on or about the 26th day of January, 1945, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under Title IX of the Social Security Act, demanding payment within ten days from said date of the sum of \$539.65 tax, and interest in the sum of \$128.41, a total of \$668.06, alleged to be due "for the calendar year 1940," under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Chronicle in the City of San Francisco.

III.

Thereafter, and on or about the 3rd day of February, 1945, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written protest and claim for refund of the said sum of \$668.06. A copy of said written protest and claim for refund is hereunto attached marked Exhibit "4" and is by this reference made a part hereof. Plaintiff in said written protest and claim for refund stated the grounds of said protest and the basis of the said claim for refund.

IV.

That there is no liability of plaintiff under the Social Security Act for the sum of \$539.65 tax, and interest in the sum of \$128.41, a total of \$668.06, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the calendar year, 1940.

V.

No part of the sum of \$668.06 claimed by plaintiff as a refund as alleged in Paragraph VI hereof has been repaid nor has the same or any thereof been credited upon the admitted liability for Social Security or Federal Unemployment Insurance Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid.

Wherefor, plaintiff demands judgment against defendant for the sum of \$668.06, interest and costs.

That by reason of the premises, plaintiff is entitled to judgment against defendant for the aggregate sum of \$1089.66, together with interest as prayed in each cause of action hereinabove pleaded, as provided by law; for costs of suit, and for such other relief as the to the Court may seem meet and just.

Dated: San Francisco, California, October 11, 1945.

FINK & KEYSTON,

By /s/ GROVE J. FINK,

Attorneys for Plaintiff. [7]

State of California,
City and County of San Francisco—ss.

E. L. Labadie, being first duly sworn, deposes and says:

That he is Secretary-Treasurer of the Chronicle Publishing Company, the plaintiff named herein; that he has read the above and foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes them to be true.

/s/ E. L. LABADIE.

Subscribed and sworn to before me this 11th day of October, 1945.

[Seal] /s/ KATHARINE T. McDONNELL,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 11, 1945. [8]

Note

The exhibits attached to the complaint are identical with exhibits offered in evidence. The following table shows the exhibit number in the complaint and the corresponding exhibit number of the same document as introduced in evidence.

Exhibit Number In Complaint	Plaintiff's Exhibit Number in Evidence
1	35
2	36
3	4
4	37

District Court of the United States for the
Northern District of California, Southern
Division

Civil Action File No. 25230-G

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above-named Defendant:

You are hereby summoned and required to serve upon Messrs. Fink & Keyston, plaintiff's attorneys, whose address is 1018 Hearst Building, San Francisco, Calif., and answer to the complaint which is herewith served upon you, with 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: Oct. 11, 1945.

[Seal of Court]

C. W. CALBREATH,

Clerk of Court.

By WM. J. CROSBY,

Deputy Clerk.

[Endorsed]: Received Oct. 16, 1945, U. S. Marshal's Office, San Francisco, Calif., Civil 26748.
Filed Oct. 18, 1945, C. W. Calbreath, Clerk.

[Title of District Court and Cause.]

ANSWER

For answer to the complaint herein, the defendant states as follows:

1. Defendant admits the allegations of paragraphs I, II and VII of Count I and paragraph III of Count II of the complaint.

2. The defendant denies the allegations of paragraphs XV, XVI and XVII of Count 1 and paragraphs IV and V of Count II of the complaint.

3. Defendant has no knowledge or information sufficient to form a belief of the truth of the allegations of paragraphs IV, IX, XI, XII, XIII and XIV of Count I of the complaint and therefore denies every allegation therein.

4. Answering paragraph V of Count I and paragraph II of Count II of the complaint, defendant admits the allegations thereof, except that the defendant denies that the tax therein referred to was based on the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City of San Francisco, and alleges that said tax was measured by the remuneration received by said vendors as employees of the plaintiff in the sale of said newspaper.

5. Answering paragraph VI of Count I of the complaint, defendant admits the allegations thereof, except with respect to the date of February 18, 1945,

which is denied and is alleged to be February 19, 1945.

6. Answering paragraph VIII of Count I of the complaint, the defendant admits the allegations of the first sentence thereof and denies the allegations of the second sentence thereof.

7. Answering paragraph X of Count I of the complaint, the defendant admits that Exhibit "3" to the complaint is a true copy of a document executed by the persons whose signatures are subscribed thereto, but denies every other allegation therein.

8. Answering paragraph I of Count II of the complaint, the defendant incorporates by reference its answer to the paragraphs of the complaint therein referred to.

Wherefore, defendant prays that judgment be entered against plaintiff for costs and all other proper relief.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Jan. 15, 1946. [12]

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the District Court of the
United States for the Northern District of Cali-
fornia, Southern Division, held at the Court Room
thereof, in the City and County of San Francisco,
on Monday, the 28th day of January, in the year of
our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 25230-G, No. 25231-G

THE CHRONICLE PUBLISHING CO.,

vs.

UNITED STATES OF AMERICA.

Minute Order of January 28, 1946

ORDER SETTING CASES FOR TRIAL

The two above-entitled cases came on regularly
this day for hearing of motion to set for trial in
each case. After hearing G. D. Keyston, Esq., attor-
ney for plaintiff and E. Bonsall, Esq., Assistant
U. S. Attorney, it is ordered that trial of these cases
be set for March 28, 1946 (Court).

In the Southern Division of the United States
District Court for the Northern District of
California

Civ. No. 25230-G,

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause coming on for trial, both parties appearing by counsel, and having been submitted to the court for trial without a jury and the court now here after hearing all the evidence adduced and being fully advised in the premises, and having made its findings of fact and conclusions of law, finds the issues for the defendant.

Therefore, it is hereby ordered, adjudged and decreed that the plaintiff take nothing; that the action be and it is hereby dismissed on the merits; that the defendant have and recover from the plaintiff its costs in the action, and that the defendant have execution therefor.

LOUIS E. GOODMAN,

District Judge.

Entered April 28th, 1947.

[Endorsed]: Lodged February 17, 1947. Filed
and entered April 29, 1947. [14]

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the Southern Division of the
United States District Court for the Northern Dis-
trict of California, held at the Court Room thereof,
in the City and County of San Francisco, on Tues-
day, the 29th day of April, in the year of our Lord
one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

Civ. No. 25230-G,
The Chronicle Publishing Co., etc., vs.
United States;

Civ. No. 25231-G,
The Chronicle Publishing Co., etc., vs.
United States;

Civ. No. 25228-G,
Hearst Publications, Inc., etc. vs. United States;

Civ. No. 25229-G,
Hearst Publications, Inc., etc. vs. United States;

Minute Order of April 29, 1947

**ORDER THAT ENGROSSED FINDINGS AND
JUDGMENTS BE FILED AND ENTERED**

These cases heretofore having been tried before
the Court sitting without a jury, and the Court hav-
ing found in favor of the defendant upon findings
of fact and conclusions of law and the defendant
having submitted proposed findings and the plain-

tiffs having submitted proposed amendments thereto, and the Court thereafter having ordered the proposed findings submitted by the defendant engrossed, and the proposed findings thereafter having been engrossed, it is ordered that said engrossed findings and the judgments here be filed and entered in the form presented and signed. [15]

In the District Court of the United States
for the Northern District of California,
Southern Division

No. 25230-G

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

vs.

UNITED STATES OF AMERICA,
Defendant.

MOTION FOR LEAVE TO ENTER APPEAR-
ANCE OF ADDITIONAL ATTORNEYS
FOR PLAINTIFFS

Plaintiff moves the Court to enter an order permitting Reginald H. Linforth and James I. Johnson to file their appearance as additional attorneys for the plaintiff.

FINK & KEYSTON,
By GROVE J. FINK,
Attorneys for Plaintiff.

Consent to Entry of Order

Consent is hereby given to the entry of the order requested in the foregoing motion, without notice.

Dated 11, 1947.

/s/ FRANK J. HENNESSY,
Attorney for Defendant.

By C. ELMER COLLETT,
Asst. U. S. Attorney.

[Endorsed]: Filed July 14, 1947.

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO
ENTER APPEARANCES

On motion of plaintiff, and pursuant to the consent of defendant, leave is hereby granted Reginald H. Linforth and James I. Johnson to file their respective appearances in the above-entitled action as additional attorneys for plaintiff therein.

Dated July 14, 1947.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed July 14, 1947. [17]

[Title of District Court and Cause.]

APPEARANCES

The undersigned, Reginald H. Linforth and James I. Johnson, in pursuance of an order of the above-entitled court, granting them leave so to do, hereby enter their respective appearances as additional attorneys for plaintiff in the above-entitled action.

Dated July 14, 1947.

/s/ REGINALD H. LINFORTH,
910 Crocker Building,
San Francisco, California,
Sutter 4815.

/s/ JAMES I. JOHNSON,
910 Crocker Building,
San Francisco, California,
Sutter 4815.

[Endorsed]: July 14, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that The Chronicle Publishing Company, a corporation, hereby appeals to

the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947.

GROVE J. FINK,
FINK & KEYSTON,
By GROVE J. FINK,
REGINALD H. LINFORTH,
JAMES I. JOHNSON,
Attorneys for appellant The
Chronicle Publishing
Company.

Of Counsel

Calkins, Hall, Linforth & Conard.

[Endorsed]: Filed July 21, 1947.

[Title of District Court and Cause.]

COST BOND ON APPEAL

The premium on this bond is \$10 per annum.

Whereas, the plaintiff in the above-entitled action is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment entered against it in said action in the District Court of the United States, for the Northern District of California, Southern Division, in favor of the defendant in said action, on the 29th day of April, 1947.

Now, therefore, in consideration of the premises and of such appeal, the undersigned, Maryland

Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against it on the appeal or on a dismissal thereof not exceeding the sum of \$250.00, to which amount it acknowledges itself bound.

In witness whereof the corporate seal and name of the said surety company is hereto affixed and attested at San Francisco, California, by its duly authorized officer this 18th day of July, 1947.

In case of a breach of any condition hereof the above-entitled court, may, upon notice to said Maryland Casualty Company, surety hereunder, of not less than ten days, proceed summarily in the above-entitled action or proceeding to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment against said surety and award execution therefor.

[Seal]

MARYLAND CASUALTY
COMPANY,

By /s/ H. M. VREELAND, Jr.
Attorney in Fact.

[Endorsed]: Filed July 21, 1947. [21]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF THE
TIME FOR FILING RECORD ON AP-
PEAL AND DOCKETING THE ACTION.

It is hereby stipulated by and between the parties
hereto, through their respective attorneys of record:

That an order may be entered extending the time
for filing the record on appeal and docketing the
action on the appeal to the Circuit Court of Appeals
for the Ninth Circuit from the final judgment en-
tered in this action on April 29, 1947, notice of which
appeal has been filed by plaintiff.

Dated: August 20, 1947.

/s/ REGINALD H. LINFORTH,
/s/ JAMES I. JOHNSON,
Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
Attorney for Defendant.

[Endorsed]: Filed Aug. 21, 1947. [22]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE THE
RECORD ON APPEAL AND DOCKET THE
ACTION ON APPEAL

Pursuant to the stipulation of the parties hereto, it is hereby ordered that the time for filing the record on appeal and docketing the action on the appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947, notice of which appeal has been filed by plaintiff, be, and the same hereby is, extended to and including October 18, 1947.

Dated: August 21, 1947.

LOUIS B. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Aug, 21, 1947. [23]

[Title of District Court and Cause.]

WITHDRAWAL OF ATTORNEYS

Whereas, Grove J. Fink, of the firm of Fink & Keyston, died on the 23rd day of July, 1947, said firm, with the consent of plaintiff appended hereto, hereby withdraws as attorneys for plaintiff in the above entitled action.

Dated: August 19, 1947.

FINK & KEYSTON,
By /s/ GARTON D. KEYSTON.

Consent to Withdrawal

The Chronicle Publishing Company hereby consents to the withdrawal of Fink & Keyston as its attorneys in the above entitled action, leaving Reginald H. Linforth and James I. Johnson as its sole attorneys in said action.

Dated: August 19, 1947.

[Seal] THE CHRONICLE
PUBLISHING COMPANY,
By /s/ L. DENNY.

[Endorsed]: Filed Aug. 21, 1947. [24]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO WITHDRAW
AS ATTORNEYS

Pursuant to the consent of plaintiff filed herein, leave is hereby given to Messrs. Fink & Keyston to withdraw as attorneys for the plaintiff in the above entitled action.

Dated: August 21, 1947.

LOUIS E. GOODMAN,
U. S. District Judge.

Consent is hereby given to the granting of the foregoing order without notice.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
Attorneys for Defendant.

/s/ REGINALD H. LINFORTH,
/s/ JAMES I. JOHNSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 21, 1947. [25]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON WHICH
APPELANT INTENDS TO RELY UPON
APPEAL.

Appellant intends to rely upon each of the following points:

1. The court erred in holding that the news vendors involved were employees of plaintiff and were not independent contractors.

2. The court erred in the findings of fact upon which its decision was based.

3. The court erred in its conclusions of law.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Appellant.

Received a true copy of the foregoing this 23rd day of September, 1947.

WILLIAM E. LICKING,

Asst. U. S. Attorney,

Attorney for Appellee.

[Endorsed]: Filed Sept. 24, 1947. [26]

[Title of District Court and Cause.]

STIPULATION AS TO THE RECORD ON
APPEAL

It is hereby stipulated by and between the parties hereto, through their respective attorneys of record:

1. That the following are designated as the parts of the record, proceedings and evidence to be included in the record on appeal:

- (a) The complaint.
- (b) The summons.
- (c) The answer to the complaint.
- (d) Order relative to consolidation and setting case for trial on March 28, 1946, entered January 28, 1946.
- (e) Motion for judgment on pleadings filed March 22, 1946.
- (f) Order consolidating for trial cases Nos. 25228, 25229, 25230, and 25231, entered March 28, 1946. [27]
- (g) Motion for judgment, filed April 2, 1946.
- (h) A complete transcript of all the evidence and proceedings.
- (i) All exhibits identified, offered or introduced in evidence, being plaintiff's exhibits Nos. 1 through 53, both inclusive, and defendant's exhibits A through Z, both inclusive, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ.
- (j) Order submitting case, entered July 29, 1946.

- (k) Order that judgment be for defendant upon findings to be presented, entering January 2, 1947.
- (l) Opinion, filed January 2, 1947.
- (m) Defendant's request for findings, filed January 28, 1947.
- (n) Stipulation extending time to file objections, amendments and additions to findings, filed February 7, 1947.
- (o) Plaintiff's objections and suggestions for amendments and additions to findings, filed February 18, 1947.
- (p) Order settling findings of fact and conclusions of law, filed February 27, 1947.
- (q) Findings, filed April 29, 1947.
- (r) Judgment, filed April 29, 1947, together with order that findings and judgment be entered and filed, entered April 29, 1947.
- (s) Motion relative to appearances, filed July 14, 1947.
- (t) Order permitting additional appearances, filed July 14, 1947.
- (u) Appearance of Reginald H. Linforth and James I. Johnson, filed July 14, 1947.
- (v) Notice of Appeal, filed July 21, 1947.
- (w) Cost Bond on Appeal, filed July 21, 1947.
- (x) Withdrawal of Attorneys, filed August 21, 1947.
- (y) Order Granting Leave to Fink & Keyston to Withdraw as Attorneys, filed August 21, 1947.
- (z) Stipulation, filed August 21, 1947.

- (aa) Order extending time to file record on Appeal and Docket the Action, filed August 21, 1947. [28]
- (bb) Statement of points on which Appellant intends to rely upon Appeal.
- (cc) This Stipulation as to Record on Appeal.

2. That those parts of the record, proceedings and evidence described in items 1(e)-1(q), both inclusive, are identical with those parts of the record, proceedings and evidence described in items 1(e)-1(q) of the Stipulation as to the Record on Appeal in case No. 25228 (the cases being consolidated for trial); that copies thereof need not be sent up with the record on appeal in this case, but that the copies or originals thereof included in the record on appeal in case No. 25228 shall be incorporated by reference in the record on appeal in this case.

Dated: September 18, 1947.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY,

U. S. Attorney,

/s/ W. E. LICKING,

Asst. U. S. Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 19, 1947.

In the United States Circuit Court of Appeals
for the Ninth Circuit

District Court No. 25230-G

THE CHRONICLE PUBLISHING CO.,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA.

Appellee.

ORDER ENLARGING THE TIME IN WHICH
TO FILE THE RECORD ON APPEAL

On motion of appellant, and for good cause shown, the time in which the appellant may file the record on appeal and docket the action on appeal in the above-entitled case, numbered 25230-G in the District Court of the United States for the Northern District of California, Southern Division, is hereby extended to and including November 18, 1947.

Dated this 16th day of October, 1947.

WILLIAM DENMAN, 

Judge of the United States Circuit Court of Appeals
for the Ninth Circuit.

A True Copy.

Attest: Oct. 16, 1947

[Seal] /s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Oct. 16, 1947, Paul P. O'Brien,
Clerk.

[Endorsed]: Filed Oct. 17, 1947. C. W. Calbreath,
Clerk.

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 30 pages, numbered from 1 to 30, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of The Chronicle Publishing Company, a corporation, Plaintiff, vs. United States of America, Defendant, No. 25230-G, as the same now remains on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$5.10 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of November, A. D., 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 11783. United States Circuit Court of Appeals for the Ninth Circuit. The Chronicle Publishing Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 10, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11783

THE CHRONICLE PUBLISHING CO., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY, AND
DESIGNATION OF THE PARTS OF THE
RECORD NECESSARY FOR THE CON-
SIDERATION THEREOF.

Appellant intends to rely upon each of the following points:

1. The court erred in holding that the news

vendors involved were employees of appellant and were not independent contractors.

2. The court erred in findings of fact upon which its decision was based.
3. The court erred in its conclusions of law.

Appellant designates the entire record on appeal as that which is necessary for the consideration of said points, the exhibits, however, to be considered in their original form.

CALKINS, HALL, LINFORTH
& CONARD,

By /s/ REGINALD H. LINFORTH,
/s/ JAMES I. JOHNSON,
Attorneys for Appellant.

Received a true copy of the foregoing this 3 day
of November, 1947.

FRANK J. HENNESSY,
United States Attorney.

By /s/ W. E. LICKING,
Asst. United States Attorney.

[Endorsed]: Filed Nov. 25, 1947.

No. 11784

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CHRONICLE PUBLISHING COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILE
JAN 28 1948

No. 11784

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CHRONICLE PUBLISHING COMPANY,
a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Answer 26

Appeal: PAGE

Certificate of the Clerk to the Transcript of
Record on..... 42

Cost Bond on..... 33

Notice of..... 33

Order Extending Time to File the Record
on Appeal and Docket the Action on.... 35

Order Enlarging the Time in Which to File
the Record on..... 41

Statement of Points Upon Which Appel-
lant Intends to Rely Upon..... 37

Stipulation as to the Record on..... 38

Appearances 32

Certificate of Clerk to Transcript of Record on
Appeal 42

Complaint for Refund of Taxes Illegally Col-
lected 2

Cost Bond on Appeal..... 33

Judgment 28

Minute Orders:

January 28, 1946—Setting Cases for Trial. 28

April 29, 1947—Engrossed Findings of
Fact and Judgments Be Filed and En-
tered in Four Cases..... 30

Motion for Leave to Enter Appearance of Additional Attorneys for Plaintiff.....	31
Consent to Entry of Order.....	31
Names and Addresses of Attorneys.....	1
Notice of Appeal to Circuit Court of Appeals Under Rule 73(b).....	33
Order Enlarging the Time in Which to File the Record on Appeal.....	41
Order Extending Time to File the Record on Appeal and Docket the Action on Appeal....	35
Order Granting Leave to Enter Appearances...	32
Order Granting Leave to Withdraw as Attorneys	37
Statement of the Points Upon Which Appellant Intends to Rely Upon Appeal.....	37
Statement of Points Upon Which Appellant Intends to Rely, and Designation of the Parts of the Record Necessary for the Consideration Thereof	44
Stipulation for Extension of the Time for Filing the Record on Appeal and Docketing the Action	35
Stipulation as to the Record on Appeal.....	38
Summons in a Civil Action.....	25
Withdrawal of Attorneys.....	36
Consent to Withdrawal.....	36

NAMES AND ADDRESSES OF ATTORNEYS

REGINALD H. LINFORTH,
JAMES I. JOHNSON,
CALKINS, HALL, LINFORTH & CONARD,
910 Crocker Building,
San Francisco, California.

Attorneys for Plaintiff and Appellant.

FRANK J. HENNESSY,
United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,

Attorney for Defendant and Appellee.

In the United States District Court, for the
Northern District of California, Southern
Division

Civil Action No. 25231-R

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF TAXES
ILLEGALLY COLLECTED

Plaintiff complains of defendant and for cause
of action alleges:

I.

Plaintiff is, and at all times herein referred to
was, a corporation organized and existing under
and by virtue of the laws of the State of California,
qualified to and doing business in the Southern Divi-
sion of the Northern District of California and else-
where, and is a citizen of the United States of
America.

II.

Plaintiff is now and for many years last past and
at all times herein mentioned has been the owner
and publisher of The San Francisco Chronicle, a
daily newspaper printed, sold, circulated and dis-
tributed in the City and County of San Francisco,
State of California. [1*]

*Page numbering appearing at foot of page of original certified
Transcript.

III.

This is an action for the recovery of Social Security and Federal Insurance Contributions taxes erroneously and illegally collected under the provisions of Title VIII of the Social Security Act and the Federal Insurance Contributions Act, from plaintiff. It is brought against the United States of America.

IV.

At all times as used herein the term "News Vendor" means a person over the age of eighteen (18) years, who purchases newspapers at wholesale from the Publisher and resells the same at retail upon the public streets in the City and County of San Francisco, State of California.

V.

Heretofore, and on or about the 19th day of June, 1941, the Collector of Internal Revenue for the 1st District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act demanding payment within ten days from said date of the sum of \$234.00 tax, and interest in the sum of \$51.39, a total of \$285.39, alleged to be due for the period, April 1, 1937, to December 31, 1937, under the provisions of said Act on the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City of San Francisco.

VI.

Thereafter, and on or about June 27, 1941, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California, and at the same time filed its written protest and Claim for Refund of the said sum of \$285.39. A copy of said written Protest and Claim for Refund is hereunto attached marked Exhibit "1" and is by this reference made a part hereof. Plaintiff in said written Protest and Claim for Refund stated the grounds of said Protest and the basis of the said Claim for Refund. [2]

VII.

Thereafter the Commissioner of Internal Revenue disallowed and rejected the said Claim for Refund and pursuant to the provisions of Section 3772 (a) (2) of the Internal Revenue Code the Commissioner of Internal Revenue, by registered letter bearing date July 13, 1945, advised plaintiff that said Claim for Refund was disallowed. A copy of the said letter is hereunto attached marked Exhibit "2" and is by this reference made a part hereof.

VIII.

That the San Francisco Chronicle, a daily newspaper, for many years last past and at all times herein mentioned has been sold at retail on the public streets of the City and County of San Francisco, State of California, by news vendors. Said news vendors purchase copies of The San Francisco Chronicle at wholesale and thereafter sell said news-

papers to buyers thereof at the retail price of five cents per copy for each copy of the daily issue of said newspaper and at the established retail sale price for the Sunday issue of said newspaper.

IX.

At all times herein mentioned the profit to the news vendors has been and now is the difference between the wholesale price per 100 copies and the retail sales price per copy charged by said news vendors to the purchasers thereof.

X.

In the year 1937 the news vendors joined together in an organization and represented to the plaintiff and other publishers of newspapers in the City of San Francisco, State of California, that as an organization they desired to enter into a contract providing, among other things, for the purchase and sale of newspapers in said City.

Therafter after negotiations between plaintiff and said organization, said parties agreed upon the conditions to be incorporated in a contract providing, among other things, for the purchase and sale of newspapers in said City. Said contract was reduced to writing and on or about August 31, 1937, was signed by plaintiff and the said organization of news vendors. A copy of said contract is hereunto attached marked Exhibit "3" and is by this reference made a part hereof.

XI.

During all of the period of the negotiation of the said contract, Exhibit "3", and at the time of the execution thereof, it was the intent and purpose of the organization of news vendors and of plaintiff to create and maintain as between the news vendors and plaintiff the relationship of buyer and seller and to establish and maintain the news vendors as independent contractors.

XII.

Subsequent to the execution of the said contract, Exhibit "3", and throughout the term thereof, the said news vendors and plaintiff construed and interpreted said contract as establishing as between said parties the relationship of buyer and seller and construed and interpreted the status of the news vendors under the provisions of said contract as that of independent contractor and not otherwise. Said parties throughout all of the term of said contract acted with the intent and in the belief that said contract would be interpreted and construed as intended by said parties. [4]

XIII.

Thereafter on January 24, 1939 and May 28, 1940 and August 31, 1942 and August 28, 1944 said parties entered into new contracts. Each of said contracts provide, among other things, for the purchase at wholesale and the sale at retail by said news vendors of newspapers on the streets of the

City and County of San Francisco, State of California, and are similar in text, with some modifications, to the contract of August 31, 1937, Exhibit "3", but the terms of none of which subsequent contracts, modified or purport to modify, in any respect the independent relationship of the parties thereto.

XIV.

During all of the period of negotiation of each of the said four contracts subsequent to Exhibit "3" and at the time of the execution of each thereof it was the intent and purpose of the organization of news vendors and of plaintiff to maintain the relationship of buyer and seller and to maintain the status of said news vendors as independent contractors. Said parties during the term of each of said contracts have acted with the intent and in the belief that the said contracts would be interpreted and construed as intended by said parties.

XV.

That none of the news vendors selling the San Francisco Chronicle, a daily newspaper, on the streets of the City and County of San Francisco, State of California, are now and none thereof have at any time been employees of plaintiff. Said news vendors are now and always have been independent contractors purchasing from plaintiff newspapers at a wholesale price per 100 copies and thereafter selling said newspapers at retail to the public at a retail price. The plaintiff neither has nor exercises

nor claims to have or exercise any control or any right to control over the means and methods of said news vendors or any of them in the retail sale of said newspaper to the public on the public streets of the City and County of San Francisco, State of California, and said news vendors are responsible to plaintiff for the results accomplished in the retail sale of said newspaper to the public and on the public streets in said City only. [5]

XVI.

That there is no liability of plaintiff under the Federal Insurance Contributions Act for the sum of \$234.00 tax, and interest in the sum of \$51.39, a total of \$285.39, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the period, April 1, 1937, to December 31, 1937.

XVII.

No part of the sum of \$285.39 claimed by plaintiff as a refund as alleged in Paragraph VI hereof has been repaid, nor has the same been credited upon the admitted liability for Federal Insurance Contributions Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law, is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$285.39, interest and costs.

Count II

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this complaint.

II.

Heretofore, and on or about the 27th day of January, 1943, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act demanding payment within ten (10) days from said date of the sum of \$78.00 tax, and interest in the sum of \$18.57, a total of \$96.57, alleged to be due for the period, October 1, 1938, to December 31, 1938, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Chronicle in the City of San Francisco.

III.

Thereafter, and on or about the 5th day of February, 1943, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written Protest and Claim for Refund of the said sum of \$96.57. A copy of said written Protest and Claim for Refund is hereunto attached marked Exhibit "4" and is by this reference made a part hereof. Plaintiff in said

written Protest and Claim for Refund stated the grounds of said Protest and the basis of the said Claim for Refund.

IV.

That there is no liability of Plaintiff under the Federal Insurance Contributions Act for the sum of \$78.00 tax, and interest in the sum of \$18.57, a total of \$96.57, or any other sum upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the period, October 1, 1938 to December 31, 1938.

V.

No part of the sum of \$96.57 claimed by Plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same been credited upon the admitted liability for Federal Insurance Contributions Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from Defendant to Plaintiff and unpaid.

Wherefore. Plaintiff demands judgment against defendant for the sum of \$96.57, interest and costs.

Count III

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this Complaint. [7]

II.

Heretofore, and on or about the 5th day of May, 1943, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act demanding payment within ten (10) days from said date of the sum of \$78.00 tax, and interest in the sum of \$18.69, a total of \$96.69, alleged to be due for the period, January 1, 1939 to March 31, 1939, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Chronicle in the City of San Francisco.

III.

Thereafter, and on or about the 14th day of May, 1943, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written Protest and Claim for Refund of the said sum of \$96.69. A copy of said written Protest and Claim for Refund is hereunto attached marked Exhibit "5" and is by this reference made a part hereof. Plaintiff in said written Protest and Claim for Refund stated the grounds of said Protest and the basis of the said Claim for Refund.

IV.

That there is no liability of plaintiff under the Federal Insurance Contributions Act for the sum of \$78.00 tax, and interest in the sum of \$18.69, a

total of \$96.69, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the period, January 1, 1939, to March 31, 1939.

V.

No part of the sum of \$96.69 claimed by plaintiff as a refund as alleged in paragraph III hereof has been repaid, nor has the same been credited upon the admitted liability for Federal Insurance Contributions Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$96.69, interest and costs.

Count IV.

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this Complaint.

II.

Heretofore, and on or about the 26th day of July, 1943, the Collector of Internal Revenue for the First District of California, issued and sent to Plaintiff his Notice and Demand for Tax Due Under the

Federal Insurance Contributions Act demanding payment within ten (10) days from said date of the sum of \$78.00 tax, and interest in the sum of \$18.60, a total of \$96.60, alleged to be due for the period, April 1, 1939 to June 30, 1939, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Chronicle in the City of San Francisco.

III.

Thereafter, and on or about the 7th day of August, 1943, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written Protest and Claim for Refund of the said sum of \$96.60. A copy of said written Protest and Claim for Refund is hereunto attached marked Exhibit "6" and is by this reference made a part hereof. Plaintiff in said written Protest and Claim for Refund stated the grounds of said Protest and the basis of the said Claim for Refund.

IV.

That there is no liability of plaintiff under the Federal Insurance contributions Act for the sum of \$78.00 tax, and interest in the sum of \$18.60, a total of \$96.60, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the period, April 1, 1939, to June 30, 1939. [9]

V.

No part of the sum of \$96.60 claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same been credited upon the admitted liability for Federal Insurance Contributions Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$96.60, interest and costs.

Count V

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV of Count I of this Complaint.

II.

Heretofore, and on or about November 3, 1943, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act demanding payment within ten (10) days from said date of the sum of \$78.00 tax, and interest in the sum of \$18.65, a total of \$96.65, alleged to be due for the period, July 1, 1939 to September 30, 1939, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Chronicle in the City of San Francisco.

III.

Thereafter, and on or about the 13th day of November, 1943, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written Protest and Claim for Refund of the said sum of \$96.65. A copy of said written Protest and Claim for Refund is hereunto attached marked Exhibit "7" and is by this reference made a part hereof. Plaintiff in said written Protest and Claim for Refund stated the grounds of said Protest and the basis of the said Claim for Refund.

IV.

That there is no liability of plaintiff under the Federal Insurance Contributions Act for the sum of \$78.00 tax, and interest in the sum of \$18.65, a total of \$96.65, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the period, July 1, 1939 to September 30, 1939. [10]

V.

No part of the sum of \$96.65 claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same been credited upon the admitted liability for Federal Insurance Contributions Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$96.65, interest and costs.

Count VI.

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this Complaint.

II.

Heretofore, and on or about February 8, 1944, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act demanding payment within ten (10) days from said date of the sum of \$78.00 tax, and interest in the sum of \$18.70, a total of \$96.70, alleged to be due for the period, October 1, 1939, to December 31, 1939, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Chronicle in the City of San Francisco. [11]

III.

Thereafter, and on or about the 18th day of February, 1944, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written Protest and Claim for Refund of the said sum of \$96.70. A copy of said written Protest and Claim for Refund

is hereunto attached marked Exhibit "8" and is by this reference made a part hereof. Plaintiff in said written Protest and Claim for Refund stated the grounds of said Protest and the basis of the said Claim for Refund.

IV.

That there is no liability of plaintiff under the Federal Insurance Contributions Act for the sum of \$78.00 tax, and interest in the sum of \$18.70, a total of \$96.70, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the period, October 1, 1939, to December 31, 1939.

V.

No part of the sum of \$96.70 claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same been credited upon the admitted liability for Federal Insurance Contributions Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$96.70, interest and costs.

Count VII.

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III,

IV, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this Complaint.

II.

Heretofore, and on or about May 4, 1944, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act demanding payment within ten (10) days from said date of the sum of \$78.00 tax, and interest in the sum of \$18.66, a total of \$96.66, alleged to be due for the period, January 1, 1940, to March 31, 1940, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Chronicle in the City of San Francisco.

III.

Thereafter, and on or about the 13th day of May, 1944, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time led its written Protest and Claim for Refund of the said sum of \$96.66. A copy of said written Protest and Claim for Refund is hereunto attached marked Exhibit "9" and is by this reference made a part hereof. Plaintiff in said written Protest and Claim for Refund stated the grounds of said Protest and the basis of the said Claim for Refund.

IV.

That there is no liability of plaintiff under the Federal Insurance Contributions Act for the sum

of \$78.00 tax, and interest in the sum of \$18.66, a total of \$96.66, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the period, January 1, 1940, to March 31, 1940.

V.

No part of the sum of \$96.66 claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same been credited upon the admitted liability for Federal Insurance Contributions Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid. [13]

Wherefore, plaintiff demands judgment against defendant for the sum of \$96.66, interest and costs.

Count VIII.

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraph I, II, III, IV, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this Complaint.

II.

Heretofore, and on or about August 4, 1944, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal In-

surance Contributions Act demanding payment within ten (10) days from said date of the sum of \$78.00 tax, and interest in the sum of \$18.66, a total of \$96.66, alleged to be due for the period, April 1, 1940, to June 30, 1940, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Chronicle in the City of San Francisco.

III.

Thereafter, and on or about the 14th day of August, 1944, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written Protest and Claim for Refund of the said sum of \$96.66. A copy of said written Protest and Claim for Refund is hereunto attached marked Exhibit "10" and is by this reference made a part hereof. Plaintiff in said written Protest and Claim for Refund stated the grounds of said Protest and the basis of the said Claim for Refund.

IV.

That there is no liability of plaintiff under the Federal Insurance Contributions Act for the sum of \$78.00 tax, and interest in the sum of \$18.66, a total of \$96.66, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the period, April 1, 1940, to June 30, 1940.

V.

No part of the sum of \$96.66 claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same been credited upon the admitted liability for Federal Insurance Contributions Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendants to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$96.66, interest and costs.

Count IX.

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraph I, II, III, IV, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this Complaint.

II.

Heretofore, and on or about January 26, 1945, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under the Federal Insurance Contributions Act demanding payment within ten (10) days from said date of the sum of \$89.94 tax, and interest in the sum of \$21.40, a total of \$111.34, alleged to be due for the period, October 1, 1940, to December 31, 1940, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the San Francisco Chronicle in the City of San Francisco.

III.

Thereafter, and on or about the 3rd day of February, 1945, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written Protest and Claim for Refund of the said sum of \$111.34. A copy of said written Protest and Claim for Refund is hereunto attached marked Exhibit "11" and is by this reference made a part hereof. Plaintiff in said written Protest and Claim for Refund stated the grounds of said Protest and the basis of the said Claim for Refund. [15]

IV.

That there is no liability of plaintiff under the Federal Insurance Contributions Act for the sum of \$89.94 tax, and interest in the sum of \$21.40, a total of \$111.34, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City and County of San Francisco, State of California, for and during the period, October 1, 1940, to December 31, 1940.

V.

No part of the sum of \$111.34 claimed by plaintiff as a refund as alleged in Paragraph III hereof has been repaid, nor has the same been credited upon the admitted liability for Federal Insurance Contributions Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$111.34, interest and costs.

That by reason of the premises, plaintiff is entitled to judgment against defendant for the aggregate sum of \$1,073.26, together with interest as prayed in each cause of action hereinabove pleaded, as provided by law; for costs of suit, and for such other relief as to the Court may seem meet and just.

Dated: San Francisco, California, October 11, 1945.

FINK & KEYSTON,
By GROVE J. FINK,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss.

E. L. Labadie, being first duly sworn, deposes and says:

That he is Secretary-Treasurer of the Chronicle Publishing Company, the plaintiff named herein; that he has read the above and foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except those matters stated on information and belief, and as to those matters he believes them to be true.

E. L. LABADIE

Subscribed and sworn to before me this 11th day of October, 1945.

[Seal] KATHARINE T. McDONNELL,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 11, 1945.

Note

The exhibits attached to the complaint are identical with exhibits offered in evidence. The following table shows the exhibit number in the complaint and the corresponding exhibit number of the same document as introduced in evidence.

Exhibit Number In Complaint	Plaintiff's Exhibit Number in Evidence
1	25
2	26
3	4
4	27
5	28
6	29
7	30
8	31
9	32
10	33
11	34

District Court of the United States for the Northern
District of California, Southern Division

Civil Action File No. 25231-R

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Messrs. Fink & Keyston, plaintiff's attorneys, whose address is: 1018 Hearst Building, San Francisco, Calif. an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court] C. W. CALBREATH,
Clerk of Court.

By WM. J. CROSBY,
Deputy Clerk.

Date: Oct. 11, 1945.

(Return on Service of Writ.) [19]

[Endorsed]: Received Oct. 16, 1945, U. S. Marshal's Office, San Francisco, Calif., Civil 26749, Filed Oct. 18, 1945.

[Title of District Court and Cause.]

ANSWER

For answer to the complaint filed herein, defendant states as follows:

1. Defendant admits the allegations of paragraphs I, II, VI and VII of Count I and paragraph III in each of Counts II, III, and V to IX, inclusive, of the complaint.

2. Defendant denies the allegations of paragraphs XV, XVI, and XVII of Count I and paragraphs IV and V in each of Counts II to IX, inclusive, of the complaint.

3. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs IV, IX, XI, XII, XIII and XIV of Count I of the complaint and therefore denies every allegation therein.

4. Answering paragraph V of Count I and paragraph II in each of Counts II to IX, inclusive, of the complaint, defendant admits the allegations thereof, except that defendant denies that the tax therein referred to was based on the assumed or alleged earnings of news vendors selling the San Francisco Chronicle in the City of San Francisco, and alleges that said tax was measured by the remuneration received by said vendors as employees of the plaintiff in the sale of said newspaper.

5. Answering paragraph VIII of Count I of the complaint, [20] defendant admits the allegations of the first sentence thereof and denies the allegations of the second sentence thereof.

6. Answering paragraph X of Count I of the complaint, defendant admits that Exhibit "3" to the complaint is a true copy of a document executed by the persons whose signatures are subscribed thereto, but denies every other allegation therein.

7. Answering paragraph I in each of Counts II to IX, inclusive, of the complaint, defendant incorporates by reference its answer to the paragraphs of the complaint therein referred to.

8. Answering paragraph III of Count IV of the complaint, defendant admits the allegations thereof, except with respect to the date of August 7, 1943, which is denied and is alleged to be August 9, 1943.

Wherefore, defendant prays that judgment be entered against plaintiff for costs and all other proper relief.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Jan. 15, 1946. [21]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 28th day of January, in the year of our Lord one thousand nine hundred and forty-six. Present: The Honorable Louis E. Goodman,
District Judge.

Nos. 25230-G, 25231-G

THE CHRONICLE PUBLISHING CO.,

vs.

UNITED STATES OF AMERICA.

Minute Order of January 28, 1946

ORDER SETTING CASES FOR TRIAL

The two above-entitled cases came on regularly this day for hearing of motion to set for trial in each case. After hearing G. D. Keyston, Esq., attorney for plaintiff, and E. Bonsall, Esq., Assistant U. S. Attorney, it is ordered that trial of these cases be set for March 28, 1946 (Court). [22]

In the Southern Division of the United States District Court for the Northern District of California

No. 25231

THE CHRONICLE PUBLISHING COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause coming on for trial, both parties appearing by counsel, and having been submitted to the

court for trial without a jury and the court now here after hearing all the evidence adduced and being fully advised in the premises, and having made its findings of fact and conclusions of law, finds the issues for the defendant.

Therefore, it is hereby ordered, adjudged and decreed that the plaintiff take nothing; that the action be and it is hereby dismissed on the merits; that the defendant have and recover from the plaintiff its costs in the action, and that the defendant have execution therefor.

LOUIS E. GOODMAN,
District Judge.

Entered April 28th, 1947.

[Endorsed]: Lodged, 2/17/47. Filed and entered April 29, 1947. [23]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 29th day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

Civ. No. 25230-G

THE CHRONICLE PUBLISHING CO., Etc., vs.
UNITED STATES.

Civ. No. 25231-G

THE CHRONICLE PUBLISHING CO., Etc., vs.
UNITED STATES.

Civ. No. 25228-G

HEARST PUBLICATIONS, INC., Etc., vs.
UNITED STATES.

Civ. No. 25229-G

HEARST PUBLICATIONS, INC., Etc., vs.
UNITED STATES.

Minute Order of April 29, 1947

ORDER THAT ENGROSSED FINDINGS AND
JUDGMENTS BE FILED AND ENTERED

These cases heretofore having been tried before the Court sitting without a jury, and the Court having found in favor of the defendant upon findings of fact and conclusions of law and the defendant having submitted proposed findings and the plaintiffs having submitted proposed amendments thereto, and the Court thereafter having ordered the proposed findings submitted by the defendant engrossed, and the proposed findings thereafter having been engrossed, it is Ordered that said engrossed findings and the judgments herein be filed and entered in the form presented and signed. [24]

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 25231-G

THE CHRONICLE PUBLISHING COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR LEAVE TO ENTER APPEAR-
ANCE OF ADDITIONAL ATTORNEYS
FOR PLAINTIFF

Plaintiff moves the court to enter an order per-
mitting Reginald H. Linforth and James I. John-
son to file their appearance as additional attorneys
for the plaintiff.

GROVE J. FINK,
FINK & KEYSTON,
By GROVE J. FINK,
Attorneys for Plaintiff.

Consent to Entry of Order

Consent is hereby given to the entry of the order
requested in the foregoing motion, without notice.

Dated: July 11, 1947.

/s/ FRANK J. HENNESSY,
Attorney for Defendant.

By C. ELMER COLLETT,
Asst. U. S. Attorney.

[Endorsed]: Filed July 14, 1947. [25]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO ENTER
APPEARANCES

On motion of plaintiff, and pursuant to the consent of defendant, leave is hereby granted Reginald H. Linforth and James I. Johnson to file their respective appearances in the above-entitled action as additional attorneys for plaintiff therein.

Dated: July 14, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed July 14, 1947. [26]

[Title of District Court and Cause.]

APPEARANCES

The undersigned, Reginald H. Linforth and James I. Johnson, in pursuance of an order of the above-entitled court, granting them leave so to do, hereby enter their respective appearances as additional attorneys for plaintiff in the above-entitled action.

Dated: July 14, 1947.

/s/ REGINALD H. LINFORTH,

910 Crocker Building,

San Francisco, California,

Sutter 4815.

/s/ JAMES I. JOHNSON,

910 Crocker Building,

San Francisco, California,

Sutter 4815.

[Endorsed]: Filed July 14, 1947. [27]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b)

Notice is hereby given that The Chronicle Publishing Company, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947.

GROVE J. FINK,
FINK & KEYSTON,

By GROVE J. FINK.

REGINALD H. LINFORTH,
JAMES I. JOHNSON,

Attorneys for Appellant The Chronicle Publishing
Company.

Of Counsel.

Calkins. Hall, Linforth & Conrad

[Endorsed]: Filed July 21, 1947. [28]

[Title of District Court and Cause.]

COST BOND ON APPEAL

The Premium on This Bond Is \$10 Per Annum.

Whereas, the plaintiff in the above-entitled action is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment entered against it in said action in the District Court of the United States, for the Northern District of California, Southern Division, in favor of the defendant in said action, on the 29th day of April, 1947.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against it on the appeal or on a [29] dismissal thereof not exceeding the sum of \$250.00, to which amount it acknowledges itself bound.

In Witness Whereof the corporate seal and name of the said surety company is hereto affixed and attested at San Francisco, California, by its duly authorized officer this 18th day of July, 1947.

In case of a breach of any condition hereof the above-entitled court may, upon notice to said Maryland Casualty Company, surety hereunder, of not less than ten days, proceed summarily in the above-entitled action or proceeding to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment against said surety and award execution therefor.

[Seal]

MARYLAND CASUALTY
COMPANY,

By /s/ H. M. VREELAND, JR.,
Attorney in Fact.

[Endorsed]: Filed July 21, 1947. [30]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF THE
TIME FOR FILING THE RECORD ON AP-
PEAL AND DOCKETING THE ACTION

It Is Hereby Stipulated by and between the parties hereto through their respective attorneys of record:

That an order may be entered extending the time for filing the record on appeal and docketing the action on the appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947, notice of which appeal has been filed by plaintiff.

Dated: August 20, 1947.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY,

U. S. Attorney,

Attorney for Defendant.

[Endorsed]: Filed Aug. 21, 1947. [31]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE THE
RECORD ON APPEAL AND DOCKET
THE ACTION ON APPEAL

Pursuant to the stipulation of the parties hereto, it is hereby ordered that the time for filing the record on appeal and docketing the action on the appeal to the Circuit Court of Appeals for the Ninth

Circuit from the final judgment entered in this action on April 29, 1947, notice of which appeal has been filed by plaintiff, be, and the same hereby is, extended to and including October 18, 1947.

Dated: August 21st, 1947.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Aug. 21, 1947. [32]

[Title of District Court and Cause.]

WITHDRAWAL OF ATTORNEYS

Whereas, Grove J. Fink, of the firm of Fink & Keyston, died on the 23rd day of July, 1947, said firm, with the consent of plaintiff appended hereto, hereby withdraws as attorneys for plaintiff in the above-entitled action.

Dated: August 19, 1947.

FINK & KEYSTON,
By /s/ GARTON D. KEYSTON.

Consent to Withdrawal

The Chronicle Publishing Company hereby consents to the withdrawal of Fink & Keyston as its attorneys in the above-entitled action, leaving Reginald H. Linforth and James I. Johnson as its sole attorneys in said action.

Dated: August 19, 1947.

[Seal] THE CHRONICLE
PUBLISHING COMPANY,
By /s/ L. DENNY.

[Endorsed]: Filed Aug. 21, 1947. [33]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO WITHDRAW
AS ATTORNEYS

Pursuant to the consent of plaintiff filed herein, leave is hereby given to Messrs. Fink & Keyston to withdraw as attorneys for the plaintiff in the above-entitled action.

Dated: August 21st, 1947.

LOUIS E. GOODMAN,
U. S. District Judge.

Consent is hereby given to the granting of the foregoing order without notice.

/s/ FRANK J. HENNESSY,
U. S. Atty.,
Attorneys for Defendant.

/s/ REGINALD H. LINFORTH,
/s/ JAMES I. JOHNSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 21, 1947. [34]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON
WHICH APPELLANT INTENDS TO
RELY UPON APPEAL

Appellant intends to rely upon each of the following points.

1. The court erred in holding that the news

vendors involved were employees of plaintiff and were not independent contractors.

2. The court erred in the findings of fact upon which its decision was based.

3. The court erred in its conclusions of law.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Appellant.

Received a true copy of the foregoing this 24th day of September, 1947.

WILLIAM E. LICKING,

Asst. U. S. Atty.,

Attorney for Appellee.

[Endorsed]: Filed Sept. 24, 1947. [35]

[Title of District Court and Cause.]

STIPULATION AS TO THE RECORD ON APPEAL

It is hereby stipulated by and between the parties hereto, through their respective attorneys of record:

1. That the following are designated as the parts of the record, proceedings and evidence to be included in the record on appeal:

(a) The complaint.

(b) The summons.

(c) The answer to the complaint.

(d) Order relative to consolidation and setting case for trial on March 28, 1946, entered January 28, 1946.

(e) Motion for judgment on pleadings filed March 22, 1946.

(f) Order consolidating for trial cases Nos. 25228, 25229, 25230, and 25231, entered March 28, 1946. [36]

(g) Motion for judgment, filed April 2, 1946.

(h) A complete transcript of all the evidence and proceedings.

(i) All exhibits identified, offered or introduced in evidence, being plaintiff's exhibits Nos. 1 through 53, both inclusive, and defendant's exhibits A through Z, both inclusive, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ.

(j) Order submitting case, entered July 29, 1946.

(k) Order that judgment be for defendant upon findings to be presented, entered January 2, 1947.

(l) Opinion, filed January 2, 1947.

(m) Defendant's request for findings, filed January 28, 1947.

(n) Stipulation extending time to file objections, amendments and additions to findings, filed February 7, 1947.

(o) Plaintiff's objections and suggestions for amendments and additions to findings, filed February 18, 1947.

(p) Order settling findings of fact and conclusions of law, filed February 27, 1947.

(q) Finding, filed April 29, 1947.

(r) Judgment, filed April 29, 1947, together with order that findings and judgment be entered and filed, entered April 29, 1947.

(s) Motion relative to appearances, filed July 14, 1947.

(t) Order permitting additional appearances, filed July 14, 1947.

(u) Appearance of Reginald H. Linforth and James I. Johnson, filed July 14, 1947.

(v) Notice of Appeal, filed July 21, 1947.

(w) Cost Bond on Appeal, filed July 21, 1947.

(x) Withdrawal of Attorneys, filed August 21, 1947.

(y) Order Granting Leave to Fink & Keyston to Withdraw as Attorneys, filed August 21, 1947.

(z) Stipulation, filed August 21, 1947.

(aa) Order Extending Time to File Record on Appeal and Docket the Action, filed August 21, 1947.

(bb) Statement of Points on Which Appellant Intends to Rely Upon Appeal.

(cc) This Stipulation as to the Record on Appeal.

2. That those parts of the record, proceedings and evidence described in items 1(e)-1(q), both inclusive, are identical with those parts of the record, proceedings and evidence described in items 1(e)-1(q) of the Stipulation as to the Record on Appeal in case No. 25228 (the cases being consolidated for trial); that copies thereof need not be sent up with the record on appeal in this case, but that the copies or originals thereof included in the record on appeal in case No. 25228 shall be incorporated by reference in the record on appeal in this case.

Dated: September 18, 1947.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY,

U. S. Attorney.

/s/ W. E. LICKING,

Asst. U. S. Atty.,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 24, 1947. [38]

In the United States Circuit Court of Appeals
for the Ninth Circuit

District Court No. 25231-G

THE CHRONICLE PUBLISHING CO., a Cor-
poration,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER ENLARGING THE TIME IN WHICH
TO FILE THE RECORD ON APPEAL

On motion of appellant, and for good cause shown,
the time in which the appellant may file the record
on appeal and docket the action on appeal in the
above-entitled case, numbered 25231-G in the Dis-
trict Court of the United States for the Northern

District of California, Southern Division, is hereby extended to and including November 18, 1947.

Dated this 16th day of October, 1947.

[Seal] WILLIAM DENMAN,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

A True Copy.

Attest: Oct. 16, 1947.

/s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Oct. 16, 1947. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Oct. 17, 1947. C. W. Calbreath, Clerk. [39]

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 39 pages, numbered from 1 to 39, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of *The Chronicle Publish-*

ing Company, a Corporation, Plaintiff, vs. United States of America, Defendant, No. 25231-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$5.50 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of November, A.D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 11784. United States Circuit Court of Appeals for the Ninth Circuit. The Chronicle Publishing Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 10, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11784

THE CHRONICLE PUBLISHING CO., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY, AND DESIGNATION OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Appellant intends to rely upon each of the following points:

1. The court erred in holding that the news vendors involved were employees of appellant and were not independent contractors.
 2. The court erred in the findings of fact upon which its decision was based.
 3. The court erred in its conclusions of law.
- Appellant designates the entire record on appeal

as that which is necessary for the consideration of said points, the exhibits, however, to be considered in their original form.

CALKINS, HALL, LINFORTH
& CONARD,

By /s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Appellant.

Received a true copy of the foregoing this
day of November, 1947.

FRANK J. HENNESSY,

United States Attorney.

By /s/ W. E. LICKING,

Asst. U. S. Atty.

[Endorsed]: Filed Nov. 25, 1947.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

vs.

UNITED STATES OF AMERICA,

Appellant,

No. 11,781

No. 11,782

Appellee.

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

vs.

UNITED STATES OF AMERICA,

Appellant,

No. 11,783

No. 11,784

Appellee.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

REGINALD H. LINFORTH,

JAMES I. JOHNSON,

910 Crocker Building, San Francisco, California,

Attorneys for Appellants.

CALKINS, HALL, LINFORTH & CONARD,

Crocker Building, San Francisco, California,

Of Counsel.

FILED

MAR - 5 1946

PAUL P. CONNOR,

Subject Index

	Page
Statement as to jurisdiction.....	1
Statement of the case	2
The issue	2
The facts	2
Specification of errors	6
Summary of argument	7
I.	
The opinion and decisions of the Supreme Court in the Silk and Greyvan cases reflect the controlling principles applicable to this case	8
II.	
The retail sales operations of the vendors were not an integral part of the publisher's business, but could they be so con- sidered from some point of view, this would not render the buyer-seller relationship unrealistic.....	13
III.	
A fair application of all the relevant tests shows that the vendors were independent contractors.....	17
(a) The control test	17
(b) Other pertinent factors	26
IV.	
Congress never intended a construction of the Social Security Act which would permit the vendors to be classed as em- ployees	30
Conclusion	37

Table of Authorities Cited

Cases	Pages
Anglim v. Empire Star Mines Co., Ltd. (C.C.A. 9th Cir. 1942), 129 F. (2d) 914	19, 23, 30, 36
Bartels v. Birmingham and Geer v. Birmingham, 91 L. Ed. (Ad. Op.) 1584	21
Glenn v. Beard, 141 F. (2d) 376	36
Indian Refining Co. v. Dallman (D. Ct. S.D. Ill. 1940), 31 F. Supp. 455, aff. 119 F. (2d) 417.....	20, 25
N.L.R.B. v. Hearst Publications, 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851	32, 33, 34
N.L.R.B. v. Nevada Consolidated Copper Corp., 316 U. S. 105, 86 L. Ed. 1305, 62 S. Ct. 960.....	33
Nevin, Inc., v. Rothensies (D. Ct. E.D. Pa. 1945), 58 F. Supp. 460, aff. 151 F. (2d) 189.....	20, 25, 36
Texas Co. v. Higgins (C.C.A. 2nd Cir. 1941), 118 F. (2d) 636	23, 36
United States v. Silk and Harrisson v. Greyvan Lines (1947), 91 L. Ed. (Ad. Op.) 1335.....	7, 8, 9, 12, 17, 20, 23, 26, 29, 32, 33, 34, 36
U. S. v. Aberdeen Aerie No. 24 (C.C.A. 9th Cir. 1945), 148 F. (2d) 655	21, 36

Codes

Judicial Code, 28 U.S.C.A. :	
Section 41 (20)	2
Sections 225 and 226	2

Miscellaneous

Treas. Dept. Reg. 107, Section 403.204	18
80th Congress, 1st Session, Report No. 245	34
H.R. 3020	34
H.R. 4120	31
H.R. 6635	31

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Appellant,

vs.

No. 11,781

No. 11,782

UNITED STATES OF AMERICA,

Appellee.

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

Appellant,

vs.

No. 11,783

No. 11,784

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

In these four actions, consolidated below for the purpose of trial and on appeal for the purpose of the briefs and oral arguments, plaintiffs seek refund of Federal Insurance Contributions and Unemployment taxes collected from them for the taxable periods within the years 1937 through 1940. On April 29, 1947, the United States District Court for the North-

ern District of California entered a judgment in each case, dismissing the action on the merits. Jurisdiction in the District Court is conferred by the Judicial Code, 28 U.S.C.A., Sec. 41 (20). Jurisdiction on appeal is conferred by the Judicial Code, 28 U.S.C.A., Sections 225 and 226.

STATEMENT OF THE CASE.

The Issue.

The taxes sought to be recovered were arbitrarily assessed against appellant publishers on the estimated income derived by street vendors from the sale of newspapers to the public within the period 1937-1940. The assessment of the taxes was based on the claim that the vendors were the employees of the publishers. This claim is denied by the publishers who contend that the vendors were independent contractors. Thus the issue is presented. No other issue is involved. The pertinent provisions of the applicable statutes are set forth in the Appendix (Appendix I).

The Facts.

How daily newspapers reach the public is a matter of common knowledge. Some are delivered at homes and offices to regular subscribers by carriers—usually boys under eighteen years of age. Some are sold in stores, hotels, and building lobbies. Some are sold from racks, the purchaser helping himself. Some are sold on the street corners and other public places by men over eighteen years of age known as vendors. It

is the relationship of these vendors to the publishers that is in question.

Early in 1937, the vendors in San Francisco organized as the Newspaper and Periodical Vendors' and Distributors' Union No. 468, hereinafter called the "Union." On August 31, 1937, the Union and the publishers, the latter through the San Francisco Newspaper Publishers' Association, entered into a formal contract, covering the sale of newspapers on the streets of San Francisco. This contract was followed by another in 1939, and a third in 1940. All are admittedly similar in such of their terms as are here material and hence will be referred to collectively as the "contract." A copy of the 1940 contract is set forth in the Appendix (Appendix III).

Operations under the contract were as follows:

There were various types of so-called corners. There was the Full-Time Corner where the vendor operated for the full selling period as agreed in the contract; the Part-Time Corner where the vendor operated for an agreed part of the selling period; the Special Events Corner, meaning a selling location at some event, such as a prize fight; and the Special Wrapped Edition Corner where special editions were sold wrapped ready for mailing by the purchaser. In addition, there was provision for Roving News Vendors, that is to say, vendors who sold newspapers anywhere.

Dealings as to any corner were between the publisher and the individual vendor, the arrangement between them being in conformity with the contract. Whenever an existing corner became vacant, or a new

corner was added, the Union would supply the publisher with a list of available vendors from which the publisher would select the one it desired and offer him the corner. Upon the vendor's acceptance, the deal was made. A vendor's contract for a corner could not be terminated by the publisher, except for default.

As newspapers came off the press, employees of the publishers known as "wholesalers" delivered to each vendor, at his corner, the number the latter specified. This procedure was repeated as each successive edition came off the press. The wholesale price to the vendor and the retail price to the public were negotiated prices fixed by the contract, uniform throughout the city, and not subject to change by either party during the life of the contract. The wholesalers collected daily from the vendors for all papers delivered to them and not returned. The difference between the wholesale price paid by the vendor and the retail price which he received, belonged to the vendor.

The vendors were not required to go, and did not go, to any sales meetings. They were not required to receive or follow, nor did they receive or follow, any instructions or orders from the publishers. They were not required to make, nor did they make, any reports or returns of any kind. They were free to hire, and sometimes did hire, substitutes at their own cost. They extended credit to some customers at their own risk.

The only contact between the vendors and the publishers was through the wholesalers, who had no authority under the contract and were specifically in-

structed by the publishers not to attempt to control or discipline the vendors in any way. The wholesalers did report to the publishers any defaults or misfeasances they observed, and the publishers had the right to terminate any contract for cause or ask the Union to take disciplinary action. If a contract was so terminated and the vendor felt that the publisher had acted without justifiable cause, he had recourse, through the Union, to arbitration.

Many corners were "consolidated corners," meaning corners where one vendor sold two newspapers—for example: the San Francisco Examiner and the San Francisco Chronicle, the morning papers; or the San Francisco News and the San Francisco Call-Bulletin, the evening papers.

The publishers sometimes wanted retail outlets at corners which would not yield an attractive profit to the vendor thereon. To induce vendors to take such corners, the contract provided for a guarantee, on the part of the publishers, that a vendor's weekly profits from the sale of papers would equal or exceed a given figure. While, under the contract, the guarantee applied to all corners, there were relatively few where the vendor's profits were not in excess of the guaranteed amount. As to the Heart publications, the profits of approximately 87% of the vendors of the Examiner, and of 75% of the vendors of the Call-Bulletin, equalled or exceeded the guarantee. The only evidence as to the San Francisco Chronicle shows that during five weeks in 1943, the profits of 70% of the vendors equalled or exceeded the guarantee, and that

at the time of trial, the profits of 92% equalled or exceeded the guarantee.

A vendor could handle a competing paper with the consent of the publisher, and consent was common, as witness the consolidated corners. The vendors were free under the contract to handle non-competitive publications and any other articles, and many vendors, about one-sixth of the total, did sell magazines, out-of-town papers, cigarettes, razor blades, chewing gum, candy, etc.

The contract by express terms declares the intent of the parties to maintain a seller-buyer relationship and not an employer-employee relationship. The Union, as *amicus curiae*, seeks to preserve that relationship.

Appellants believe the question as to the status of street news vendors under the Social Security Act is presented to a Federal Court for the first time in this case.

SPECIFICATION OF ERRORS.

Appellants say that the District Court erred:

1. In finding that the vendors were controlled by the publishers in a manner inconsistent with an independent contractor relationship, and in failing to find that there was an absence of such control.

2. In failing to find that factors other than absence of control existed which indicated the independent contractor relationship.

3. In finding that the retail sale of newspapers was an integral part of the publisher's business, and in failing to find that the retail sale of newspapers by persons independent of the publisher was common practice and not unrealistic.

4. After having erroneously found that the street sale of papers by vendors was an integral part of the business of the publisher, in compounding the error by concluding that this finding was of major importance in determining the status of the vendors.

5. In holding that the vendors in this case were employees subject to the Social Security Act.

SUMMARY OF ARGUMENT.

I.

The opinion and decisions of the Supreme Court in the *Silk* and *Greyvan* cases reflect the controlling principles applicable to this case.

II.

The retail sales operations of the vendors were not an integral part of the publisher's business, but could they be so considered from some point of view, this would not render the buyer-seller relationship unrealistic.

III.

A fair application of all the relevant tests shows that the vendors were independent contractors.

- (a) The control test.
- (b) Other pertinent factors.

IV.

Congress never intended a construction of the Social Security Act which would permit the vendors to be classed as employees.

I.

THE OPINION AND DECISIONS OF THE SUPREME COURT IN THE SILK AND GREYVAN CASES REFLECT THE CONTROLLING PRINCIPLES APPLICABLE TO THIS CASE.

Since the opinion was rendered in the court below, the United States Supreme Court, in two important decisions, has dealt with the question of when one is an employee or an independent contractor within the meaning of the Social Security laws. These decisions are *United States v. Silk* and *Harrisson v. Greyvan Lines*, (June 16, 1947), 91 L. Ed. (Ad. Op.) 1335. Both were actions to obtain refund of employment taxes.

In the *Silk* case, the plaintiff was a retail coal dealer. The status of the men who unloaded cars of coal which the dealer purchased, and of the truckers who delivered coal which he sold, was involved. The coal unloaders came to the dealer's yard when and as they pleased, bringing their own shovels, and unloaded cars at so much per car. They were held by the Supreme Court to be employees. The coal truckers

owned their own trucks. They assembled at the yard and placed their names on a call list. When an order was received, the dealer rang a bell and the trucker at the head of the list delivered the coal for a stipulated sum and collected the price of coal sent collect. The truckers were under no obligation to accept a call to deliver coal. They could hire any assistants they wished, and paid all of their own expenses. They also hauled for others. The dealer paid any damage they caused in making deliveries. They were held by the Supreme Court to be independent contractors.

In the *Greyvan* case, the plaintiff company was a common carrier with headquarters in Chicago and agencies in various states to solicit business. Its system of doing business was adopted prior to the passage of the Social Security laws. Under this system, it entered into a contract with truckers, terminable by either party at any time, under which each trucker agreed to furnish his own truck; to pay all trucking expenses, including any labor he saw fit to hire; to pay for all insurance which the company might specify; to pay for all damages in shipment; to paint "Greyvan Lines" on his truck; to collect and account for all moneys due from customers; to post a bond with the company; to be present on the truck and to drive it except when a competent relief driver was at the wheel; and to abide by the company's rules and regulations. All contracts with the customer were between the company and the customer. The company instructed each trucker when and where to load freight. As compensation, the truckers received a percentage

of the tariff, between fifty and fifty-two percent, plus a small percentage bonus for satisfactory performance. The company secured all franchises and permits, and the company also carried cargo insurance. A manual issued by the company contained detailed instructions relative to operations but there was evidence that these instructions were not enforced and that the truckers were not controlled as to the manner of doing the trucking. There was a contract between the company and the truckers' union which required all truckers to be members of the union and that all grievances be settled by the company and the union. The insurance required of the truckers was actually under a group policy, each trucker paying his share of the cost. The company had some truckers which admittedly were employees, but the truckers whose operations are described above were held by the Supreme Court to be independent contractors.

In its opinion, the Supreme Court states:

“Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst Case*. This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the Act. The taxpayer must be an ‘employer’ and the man who receives wages an ‘employee.’ There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material,

manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social security taxes.

“The long-standing regulations of the Treasury and the Federal Security Agency (H Doc 595, 79th Cong 2d Sess) recognize that independent contractors exist under the Act. The pertinent portions are set out in the margin. Certainly the industry’s right to control how ‘work shall be done’ is a factor in the determination of whether the worker is an employee or independent contractor. The Government points out that the regulations were construed by the Commissioner of Internal Revenue to cover the circumstances here presented. This is shown by his additional tax assessments. Other instances of such administrative determinations are called to our attention.

“ * * *

“Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship. *The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.*” (Emphasis added.)

From the foregoing, it is clear that while the Social Security Act is to be liberally construed in the light

of its objectives, there is no intention to change normal business relationships; and it is relatively unimportant, in determining the status of an individual, that, in a broad sense, his functions are an integral part of the business. The Supreme Court held that truckers, who were certainly an integral part of the trucking business, and retail coal delivery men, who were certainly an integral part of the retail coal business, were both independent contractors.

It also is clear that in determining the status of the persons there involved, the Supreme Court considered the ordinary factors distinguishing independent contractors from employees, namely, degrees of control, opportunities for profit or loss, investment in facilities, permanency of the relation, and the skill required in the claimed independent operation. Also, it pointed out that no one of these factors was controlling, nor was the list complete. Furthermore, by its decision, the Supreme Court gave effect to the arrangement between the parties. In a sense, the arrangement was a controlling factor. Normally, the trucking of a trucking company and the deliveries of a retail coal dealer are the work of employees. Nevertheless, the truckers and the delivery men were held to be independent contractors because such was the intent of the parties, and the arrangement, in each case, was consistent with that intent.

It has been said, and no doubt will be urged in this case, that the opinion in the *Silk* and *Greyvan* cases repudiates common law concepts and proclaims the objectives of the Social Security Act as controlling.

Appellants submit that it does not. The statement that technical concepts are to be avoided and the Social Security Act liberally construed in the light of its objectives is followed by the admonition that Congress shows no intention to change "normal business relationships"; then, by a reference to the regulation which emphasizes the factor of control over the manner of doing the work; and finally, by a statement setting forth the factors which have been enumerated above, which factors are some of the ordinary ones that have long been considered by the courts at common law. Thus, upon reading the entire opinion and giving effect to the decisions of the Supreme Court, it is evident the substance of what the court has said is that the ordinary factors applied at common law still are the important ones, but that in applying these factors technical concepts should not be controlling.

As appellants will later develop in this brief, the principles announced in these cases are consistent with earlier rulings of this and other Circuit Courts of Appeals.

II.

THE RETAIL SALES OPERATIONS OF THE VENDORS WERE NOT AN INTEGRAL PART OF THE PUBLISHER'S BUSINESS, BUT COULD THEY BE SO CONSIDERED FROM SOME POINT OF VIEW, THIS WOULD NOT RENDER THE BUYER-SELLER RELATIONSHIP UNREALISTIC.

Included in the opinion of the District Court are these statements: "But the relationship of buyer and seller between them [the publishers and the vendors]

is entirely unrealistic. The Publishers are not engaged in the wholesale business of selling newspapers to retailers and the news vendors are not in any sense retail merchants in the business of buying and selling merchandise. (R. 39) . . . Here the news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publisher." (R. 46). Appellants challenge these statements, and, because they denote thoughts which appear to have weighed heavily in the mind of the District Court and to have contributed largely to its decision, desire to point out the fallacies therein.

Publishers are primarily concerned with the assembling, editing, and publishing of news. They stand in much the same position as any manufacturer. They are naturally interested in the retail sale of newspapers, just as the manufacturer of cigarettes is interested in the retail sale of his product. It does not follow, however, that the publishers desire to be, or generally are, in the retail business, any more than the cigarette or other manufacturer. Although it is true that the publishers, just as some other manufacturers, make some sales direct to the consumer, as, for example, by means of unattended racks equipped with coin boxes, it is also true that they make other sales at wholesale to drugstores, cigar stores, hotels, etc. It therefore follows that it would be entirely normal and realistic either for the publishers to furnish newspapers to the vendors for sale by the latter as the publishers' employees, or to sell the newspapers to

the vendors at wholesale for sale at retail by the latter as independent contractors. Either scheme of operations would be normal and realistic. The intent of the parties and the circumstances determine which scheme is in effect.

In its reasoning the court further says (R. 39): "A newspaper is not, in fact, a commodity bought and sold as merchandise at all. It is the medium of disseminating information; it is the information which is sold and the publishers are the distributors and circulators of this information through the agency of their news vendors." This is a concept that involves a theoretical and radical departure from practical thought if it is intended to support the theory that one cannot engage in the business of selling publications at retail.

Admittedly, the public does not want a newspaper for the paper itself, but for the news which is printed thereon. The same is true of a book. The contents are the thing, not the pages or cover. Phonograph records, also, are in demand only because a musical or other composition has been impressed thereon. It is extremely doubtful, however, if anyone would seriously contend that a book or phonograph record is merely a medium of disseminating information, fiction, or musical entertainment in the sense that it cannot be dealt in by retailers who are independent of the wholesalers or manufacturers thereof. Accordingly, there is nothing "unrealistic" in the retail sale of a newspaper by a vendor as an independent contractor. There is no perceptible difference in principle between

such a transaction and the activities of the independent retail dealer in books, phonograph records, or Ford automobiles.

The District Court also has sought to fortify its statements above quoted and discussed by pointing to the fact that the vendors had the right to return and receive credit for unsold papers. When it is borne in mind that a newspaper is of an extremely perishable nature—nothing could be more obsolete than a newspaper a few hours old—it is clear that the right to return unsold copies is consistent with general practice in respect to perishable commodities. It is customary for grocers to return unsold bread and other articles which have a very limited salable life. If this was not permitted, merchants dealing in perishable merchandise could not afford to carry an adequate stock. The right of return is, therefore, no more indicative of an unrealistic relationship in the case of a vendor of newspapers than in the case of a grocer.

In short, the District Court has indicated no sound basis for its conclusion that a sale to vendors at wholesale, and a resale by them at retail, is in its nature fictitious, or unrealistic, or not in accordance with normal practice.

Having erroneously concluded that the publishers were not in the business of selling at wholesale, and that the vendors were engaged in an integral part of the publisher's business, the District Court then attached undue significance to its conclusion. Appellants contend that this so-called "integral theory" was largely dissipated by the Supreme Court in the *Silk*

and *Greyvan* cases. Those cases establish that Congress never “intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution.” The Supreme Court, in those cases, held that the retail coal dealer delivered his coal through an independent contractor and the trucking company carried on its trucking through independent contractors. It is unnecessary to go that far in the instant case. Retailing may or may not be carried on by a publisher and, in any event, is only one separable phase of his business, while the delivery of coal by a retail coal dealer and the carrying on of trucking by a trucking company constitute substantially their entire business. Clearly, the District Court in the instant case was led into error by attaching too much importance to the fact that the vendors were engaged in handling newspapers and, hence, were in the same business generally as those who published the newspapers. It should have been guided by the principle announced in the *Silk* and *Greyvan* cases and realized that this fact did not determine, nor greatly aid in determining, the status of the vendors.

III.

A FAIR APPLICATION OF ALL THE RELEVANT TESTS SHOWS THAT THE VENDORS WERE INDEPENDENT CONTRACTORS.

(a) The Control Test.

Whatever formula is used for determining the status of vendors, the extent and nature of the publishers' control is the most important consideration.

In Treas. Dept. Reg. 107, Sec. 403.204 (Appendix II), it is said with relation to who are employees:

“Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.”

With reference to the subject of control, the District Court in its opinion makes this statement (R. 41): “Here there actually was at least a reasonable measure of general control exercised by the publisher over the manner in which the services of the vendors were performed.” Appellants dispute this statement, and assert that it expresses an unfounded inference drawn by the District Court from certain unsupported and overly emphasized facts while dismissing other highly significant facts as mere “details” (R. 46). The facts asserted by the District Court which seem to have prompted its above-quoted statement are that the publishers selected the vendors; that the publishers designated the place, days, and hours, of service; that the profits of the vendors were fixed by the publishers; that the vendors were kept under the surveillance of the wholesalers; that the wholesalers were authorized to check in a vendor if he failed to perform

properly, or report infractions to the publisher who could then discontinue further sales to the vendor or report his conduct to the Union for discipline by Union agents; that the vendors were required to sell their papers complete with sections in the order designated by the publishers; and that the vendors were required to display only newspapers on the stands or racks which were furnished by the publishers at the latter's expense (R. 42).

To demonstrate the inaccuracy of the assertion that the publishers selected the vendors, it should be sufficient to point out that the right to contract necessarily includes the right to select the person with whom the contract is to be made. This being so, it follows that not only the publishers, but also the vendors, had the right of selection. The latter had the right to select the publisher of any of the four San Francisco newspapers.

As to the fixing of the place, attention is directed to the fact that the arrangement between a publisher and each individual vendor was one made with respect to a particular corner, and that the arrangement once being made, the vendor remained entitled to sell at retail to the exclusion of others on that corner as long as he did not default in his obligations and the corner was not discontinued. The mere circumstance that a contract fixes the place of performance thereunder does not of itself indicate that there is, or is not, an employer-employee relationship. In the case of *Anglim vs. Empire Star Mines Co., Ltd.* (C. C. A. 9th Cir. 1942), 129 F (2d) 914, the agreement there under

examination was held to create an independent contractor relationship although the place of performance was specifically limited to designated portions of the mine. Specifying in a contract the territory to be covered thereby is the usual practice where a manufacturer chooses this method of providing for the wholesale or retail sale of his product. The territory was specified in the contract with a wholesale oil distributor in *Indian Refining Co. vs. Dallman* (D. Ct. S.D. Ill. 1940), 31 F. Supp. 455, aff. 119 F (2d) 417, and in the contract for a retail outlet in *Nevin, Inc., vs. Rothensies* (D. Ct. E.D. Pa. 1945), 58 F. Supp. 460, aff. 151 F (2d) 189. In both cases, the independent status was upheld under the Social Security Act. Indeed, it could fairly be said that the specification of the territory in such cases is more characteristic of the independent contractor relationship than of the employment relationship.

It is true that the selling hours were specified by the publishers, subject, however, to the limitations contained in the contract which prescribed the maximum hours per day and per week. In view of the "perishable" nature of a newspaper, the selling period has to conform to the times when the papers are in demand and are published and available for distribution, which, in turn, are dictated by circumstances largely beyond the control of either the publishers or the vendors—the reading habits of the public, breaks in the news, etc. Thus, the hours could not be fixed at the whim of the publishers. In any event, the fixing of hours is immaterial. In the *Greyvan* case, the inde-

pendent status was upheld even though the truckers were instructed as to "where and when to load freight." Leaders of "name" dance bands contract to play during certain hours, but are, nevertheless, independent contractors. See *Bartels vs. Birmingham* and *Geer vs. Birmingham*, 91 L. Ed. (Ad. Op.) 1584. In those cases, as in our case, the hours are actually fixed by public demand and circumstances beyond the control of either contracting party. Our case also presents the situation which obtained in *U. S. vs. Aberdeen Aerie No. 24* (C. C. A. 9th Cir. 1945), 148 F (2d) 655. There, the doctor's hours were fixed by the contract, although he was free to attend any patients provided he served the members of the Lodge. Similarly, the vendors were free during the selling hours to sell anything they desired, in any way they chose, provided they offered newspapers for sale.

Contrary to the District Court's finding, the profits received by the vendors were in no sense controlled by the publishers. They were the difference between the wholesale and retail prices of the papers the vendors sold less any and all losses incident to the vendors' business operations. The contract, concluded only after extended negotiations, fixed both the wholesale and retail prices for the term thereof. Furthermore, the vendors were free to sell other publications and articles, and many did.

The use of the word "surveillance" in connection with the activities of the wholesalers carries an implication which has no reasonable support in the record. The wholesalers' job was to deliver papers as they

came off the press, to pick up the unsold papers, to collect from the vendors, i.e., check them in (R. 28, 191, 344). If they saw any default or misfeasance on the part of a vendor, they reported it. The situation was, therefore, much the same as in the case of any wholesaler dealing with its retail customers.

The District Court's opinion relative to the right to discontinue sales contains inconsistencies. In the District Court's statement of facts, it is said (R. 27): "Prior to the first contract of August 1937, the services of a vendor were terminable at the will of the publisher. Thereafter, a vendor once engaged to sell at a particular location, was entitled by each of the successive contracts, to man that location so long as it was maintained by the publisher, unless there should arise just cause for the discontinuance of further deliveries of papers to him (e.g. drunkenness, failure to appear for work, etc.) or for his transfer from one location to another, in which event the publisher was entitled to effect such discontinuance or transfer. If a vendor felt that his contract to sell at a particular location had been unjustly discontinued by the publisher,—that is, without cause,—he could have the matter submitted to and determined by arbitration." This was also the substance of the District Court's finding in its formal Findings of Fact (R. 67, Finding 14). Notwithstanding this, the District Court states as one of the reasons it held that the vendors were controlled: "He [the wholesaler] was authorized to check in the vendor if the latter failed to so perform or to report any such infraction to the publisher,

who could then discontinue further sales to the vendor, or report his conduct to the union for discipline by union agents'' (Emphasis added) (R. 42).

The District Court was correct in finding that sales could be discontinued only for cause (Appendix III, the Contract, Secs. 34, 36). This is consistent with a buyer and seller relationship but inconsistent with most employment relationships where the employee may be dismissed at will. The right to terminate a contract for cause is no indicia of an employment arrangement. It is a provision quite common to all contracts. See *Anglim vs. Empire Star Mines*, supra. Indeed, in the *Greyvan* case, the contract was terminable not only for cause, but at the will of either party.

The District Court also seems to have attached some significance to the publisher's right to discontinue a corner. This is similar to the usual right to discontinue an independent agency. Such right is of no practical significance because, although the manufacturer can discontinue the arrangement, he thereby loses that outlet. This point was discussed by Judge Learned Hand in his opinion in the case of *Texas Co. vs. Higgins* (C.C.A. 2nd Cir. 1941), 118 F (2d) 636, 638, in which he said:

“The defendant denies that the plaintiff had no more control than this; he argues that the power to end the agency and take over the plant at cost, gave it absolute power over the business, because by this sanction it could not only intervene when and as it chose, but could direct the details of every move made. We cannot agree. The charac-

ter of the relation was determined by the rights and obligations assumed, and it is no answer that the plaintiff could force a change in these by threatening to terminate the agency.”

The District Court points to the fact that the vendors were required to sell their papers complete with sections in order as designated by the publishers. Could it be argued that the manufacturer or wholesaler of vacuum cleaners would continue to do business with any retailer who sold its products with some of the parts missing or improperly assembled?

As opposed to the asserted facts above mentioned upon which the District Court has based its conclusion that the vendors were under the control of the publishers, the true facts show that the vendors were uncontrolled in the manner of doing their business. These facts are: that the vendors were not required to report, and did not report, to the publishers' premises in connection with any of their work (R. 361); they were not required to attend, and did not attend, any sales meetings (R. 354); they were not required to file, and did not file, any reports (R. 361); neither the publishers, nor any of their representatives, including the wholesalers, had the right to direct the vendors in the performance of their business (R. 344, 191, 28); as above shown, the vendors could not be fired—the most the publishers could do in this regard was to terminate the individual contract when a vendor failed in the performance of his obligations. Even then, justification for such termination was subject to review. These circumstances outweigh those relied upon by the Dis-

trict Court, and indicate that the vendors were free of all control at the hands of the publishers except only as to the results to be accomplished. Notwithstanding this, the District Court has expressly disregarded them; in effect, dismissing them as being of no importance. Its language is (R. 46): "These were at most details of this particular service relationship in operation. They did not alter the essential factors establishing, by their presence, the employment relationship, or change their character in context."

In short, appellants do not assert a complete absence of any control, but say that such controls as do exist are those which are commonly found in a buyer-seller relationship. As the court said in the case of *Nevin, Inc., vs. Rothensies* (D. Ct. E.D. Pa. 1945), 58 F. Supp. 460, 462, aff. 151 F (2d) 189:

"The relationship between the plaintiff and the licensees is, in short, that of a wholesaler who, in order to assure a market for his goods, has contracted with retailers that they should buy exclusively from him, allowing them, as an inducement, to use his name and good will, and of retailers who, in exchange for this benefit, have surrendered such powers to the wholesaler as were necessary for the protection of this good will."

Again, it is said in *Indian Refining Co. vs. Dallman* (D. Ct. S.D. Ill. 1940), 31 F. Supp. 455, 458, aff. 119 F (2d) 417:

"Manufacturers of nationally advertised products frequently impose many conditions on the merchants who sell such products. They also are cooperative with the merchant and aid in every

way possible the sales of their merchandise. For example, a manufacturer will frequently operate a booth in a department store for the purpose of demonstrating and acquainting the public with his products. If in the case at bar Kolb and his employees are held to be employees of the Indian Refining Company, it would be but a step further to hold many merchants to be employees of manufacturers."

(b) Other Pertinent Factors.

In addition to the basic factor of control, there are other factors which are helpful in determining status. In the *Greyvan* case, the Supreme Court mentioned "opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation * * * ." To this must be added, in view of the Supreme Court's decision, the factor of intent.

It is believed that these additional factors can be characterized as common attributes of an independent business. Each of them is often, but not necessarily, present when a business is independent.

In this case all of these additional factors were present, some in a greater and some in a lesser degree. The significant facts relevant to these factors were: Some of the vendors sold one newspaper only; many sold at least two (R. 348)—in fact, practically all who sold the Examiner also sold the Chronicle, and many who sold the Call-Bulletin also sold the News; about one-sixth sold publica-

tions other than appellants' newspapers, such as racing forms, twenty-five cent pocket books, and the Peoples World (R. 226-331, 310). Many sold various articles such as candy bars, gum, pencils, and razor blades; some developed and conducted large news stands on which were sold all manner of articles. These large news stands varied in number from ten to thirty-five (R. 226-231, 310, P. Ex. 48A-H). The vendors hired substitutes and relief-men at their own expense (R. 358). The vendors were responsible for the papers delivered to them, and bore the loss in case they were lost, destroyed, or stolen (R. 185). Some developed regular customers to whom they sold on credit, thereby taking the credit risk (R. 184).

Referring to the various additional factors above-mentioned, it heretofore has been pointed out that there is a permanency of the relation in the sense that a vendor's contract for a particular corner cannot be terminated by the publisher except for cause. This type of permanency is typical of the status of such retailers as the distributors of Ford cars. It is not typical of the employment status which ordinarily may be terminated at the employer's will.

Although the arrangement between the publishers and the vendors was uniform throughout, it is obvious that the profits of each individual vendor were dependent in a very large measure upon how he carried on his business. Some were energetic and ambitious, and their profits were higher accordingly. Some had attractive personalities and a manner of dealing with the public which developed good will and thus mate-

rially increased their sales. It is common knowledge that many men will pass by several vendors to purchase their papers from a particular vendor. In addition, some of the more enterprising vendors were not content merely with the sale of one or more newspapers and so added other publications and articles to their lines. In short, the vendors were free, according to their desires, to carry on their businesses generally as they saw fit, and what they did was necessarily reflected in the amount of their profits.

The opportunity for investment was not limited in any way by the arrangement between the parties. Those who developed large news stands obviously had a moderate investment. A vendor who had one of the better corners had a valuable right. However, the investment feature is unimportant in determining the status of the vendors. No substantial investment is required for the retail sale of newspapers. Because this is true, an opportunity was, and is, afforded men with very limited means and who are frequently victims of physical handicaps, to engage in an independent business. That this is important in their minds is demonstrated by the fact that the Union appears as *amicus curiæ* to preserve their independent status.

The District Court gave undue emphasis to the admitted fact that the vendor did business on a relatively small scale and without a large investment of capital. The size of an operation is not determinative of its character. A small retailer can be just as independent in his operations as a large one, and a vendor's desire to operate in his own way and free from the control of

the publishers should not be denied him because his operations are small.

Counsel for the Government have made much of a statement by one witness that there is only one way to sell a newspaper. The answer was a correct one to the particular question asked the witness (R. 181). In a physical sense, there is only one way to sell a newspaper, that is, hand it to the customer, just as there is only one way for a retailer to sell a pack of cigarettes—hand it to the customer. That is what the witness meant. He did not mean, nor say, nor is it true, that there is only one way in which to develop the sale of newspapers.

No discussion of the independent status of these vendors would be complete without reference to the wishes of the parties themselves. The parties have deliberately and fairly framed successive contracts to maintain an independent relationship, and both desire that it be recognized. It is true that, on some matters of basic policy, the wishes of the parties must be ignored; but no sound reason can be, or has been, suggested why this should be done in the instant case. There is nothing in the Social Security Act which suggests that those charged with its enforcement should substitute their ideas as to what is best for the parties, for those of the parties themselves, when to do so changes a normal and long-established business relationship. As before pointed out, the Supreme Court has made it clear in the *Greyman* case that it sees nothing in the Act to suggest that normal business relationships are to be disturbed. This court had occa-

sion to discuss this issue in the case of *Anglim vs. Empire Star Mines Co.* (CCA 9th Cir., 1942), 129 F (2d) 914. There, the court was dealing with a situation similar to this, where the individual lessee miners, with little or no capital invested, preferred to maintain their independent status, leaving their profits to depend on their individual initiative and skill. In holding that they were entitled to maintain that independent status, the court said (p. 917):

“The typical leaser is the resourceful miner who prefers the speculative rewards, along with the risks, of operating on his own account. There was in the practice here no element of calculated tax avoidance. The taxpayer’s leasing program was inaugurated years before the Social Security Act was placed on the books. We entertain no doubt that these leasers should be classed as independent contractors. We are not unmindful of the beneficent purposes of the Act, but the extension of its benefits to wider fields is not the business of the courts.”

Much the same observations and reasons are applicable to the instant case.

IV.

CONGRESS NEVER INTENDED A CONSTRUCTION OF THE SOCIAL SECURITY ACT WHICH WOULD PERMIT THE VENDORS TO BE CLASSED AS EMPLOYEES.

The history of the Social Security Act and of the regulations issued thereunder demonstrates that Congress never intended the vendors to be covered by the Act.

The original Social Security Act, as introduced in the House (H.R. 4120), contained a lengthy definition of the term "employee," part of which was: "the term 'employee' shall include every individual . . . under any contract of employment or hire, oral or written, express or implied."

This definition was rejected, and the word "employee" was undefined except that Section 1101 (a) (b) (See Appendix I, Sec. 1426(d)) provided as follows:

"The term 'employee' includes an officer of a corporation."

Officers of a corporation were, no doubt, expressly included only because they would have been excluded under the common law concept of master and servant, which it was the intention of Congress to follow.

In 1938, the Board made recommendations for amendments to the Social Security Act. These recommendations were transmitted to Congress with a special message by the President on January 16, 1939. As a result, H.R. 6635 was introduced, and extensive hearings were held thereon by the Ways and Means Committee of the House and later by the Senate Finance Committee. The Board recommended, among other things, that definitions contained in the Act be expanded to include more persons than would come under the classical definition of "an employee." While extensive amendments were passed by Congress in 1939, no amendment enlarging the definition of "employee" was enacted.

This history establishes that Congress intended no one should be covered by the Act who did not constitute an employee under ordinary concepts.

If the view of the Treasury Department may be judged by its regulation under the Social Security Act defining the terms "employer" and "employee," (Appendix II), it has entertained no doubt that the word "employee" was used by Congress in its ordinary sense. The regulation sets forth the normal tests, emphasizing particularly control over the manner and means of doing the work. This regulation was in force at the time the 1939 amendments were rejected by Congress, and has been in force up to the present time.

The District Court based its decision in large part on a dictum in the *Hearst* case (*N.L.R.B. vs. Hearst Publications*, 322 U.S. 111, 88 L. Ed. 1170, 64 S. Ct. 851) to the effect that technical common law concepts as to what constitutes an employee are not to be controlling under social legislation. As heretofore shown, the Supreme Court reaffirmed that statement in the *Greyvan* and *Silk* cases, but it added that, notwithstanding this, Congress showed no intention to disturb normal business relationships; that to be covered by the Act, a person must be an employee; that the Regulations issued under the Act set forth a definition of "employee"; and that under all of the circumstances in the case, the two groups of truckers were independent contractors. The Supreme Court specifically referred to the ordinary tests as being the significant ones, namely—control, individual initiative, etc. Therefore, appellants reassert that the doctrine first

announced by way of dictum in the *Hearst* case, and later stated, also by way of dictum, in the *Greyvan* and *Silk* cases, is not a license to the Commissioner to reach out and bring within the coverage of the Act everyone who he considers needs the benefits thereof.

Referring more particularly to the *Hearst* case, it is important to observe that the Supreme Court in that case did not hold vendors to be employees. Long prior to that decision, the Supreme Court had adopted a steadfast rule that a finding of the agency charged with the enforcement of the Wagner Act, namely, the National Labor Relations Board, would not, and could not under the wording of the law, be disturbed if it was supported by any evidence. (*N.L.R.B. vs. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 86 L. Ed. 1305, 62 S. Ct. 960.) The Supreme Court expressly followed that rule in the *Hearst* case. The Board had found that the vendors therein involved were employees; the Supreme Court could not under its rule disturb the finding. What the same court would have done had it been free to appraise the facts, is a matter of speculation. What the Supreme Court did in the *Silk* and *Greyvan* cases is a matter of record. It is noteworthy that this Circuit Court of Appeals in that case did not leave its own views to speculation. The majority of the judges were of the opinion, and so found, that the Board's finding that the vendors were employees was not supported by substantial evidence. Judge Denman dissented, not because he differed from the other judges who held the vendors to be independent contractors, but only because he felt bound to ac-

cept the Board's finding. The same situation does not exist in the instant case. There is no rule or statute imposing the Commissioner's findings on this court. This court is free to base its decision on the facts as presented concerning the particular vendors, just as the Circuit Court of Appeals did in the *Greyvan* and *Silk* cases.

While the decision in the *Hearst* case can be dismissed with the foregoing observations, it is also true that there are significant factual differences between that case and the instant one.

Furthermore, if the *Hearst* case is given the interpretation which the lower court gave it, Congress has made it clear that such an interpretation is contrary to its intent. In its amendments to the Wagner Act, set forth in the Labor Relations Act of 1947, Congress amended the definition of "employee" so as expressly to exclude independent contractors. This amendment originated in the House and the reason for it is set forth in the Committee Report on H.R. 3020 by House Committee on Education and Labor, being Report No. 245, 80th Congress, 1st Session, in the following words:

"(d) An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had in-

cluded before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees.' The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'."

Concluding this point, it is submitted that in view of the foregoing, to hold that these vendors were employees would extend the Social Security Act far beyond the intent of Congress and, hence, be judicial legislation. The courts have repeatedly refused to countenance undue expansion of the application of the Social Security Act by the Commissioner. Thus, the effort to bring independent truckers within the coverage of the Act was not countenanced in the *Greyvan* and *Silk* cases. The effort to bring independent miners within the coverage of the Act was not countenanced by this court in the *Anglim vs. Empire Star Mines* case, *supra*. The effort to bring independent home workers within the coverage of the Act was not countenanced by the Sixth Circuit Court in the case of *Glenn vs. Beard*, 141 F. (2d) 376. The effort to bring a doctor within the coverage of the Act was not countenanced by this court in the case of *United States vs. Aberdeen Aerie No. 24*, *supra*. The effort to bring an independent operator of a retail store within the coverage of the Act was not countenanced by the Third Circuit Court in the case of *Nevin, Inc. vs. Rothensies*, *supra*. The effort to bring consignee distributors of oil products within the coverage of the Act was not countenanced in the case of *Texas vs. Higgins*, *supra*. This case presents a similar effort which, as in the cases just mentioned, and on the principles therein announced, also should not be countenanced.

CONCLUSION.

In conclusion, appellants respectfully submit that the vendors were independent contractors and not employees under the Social Security Act, and that the judgments of the District Court should, therefore, be reversed.

Dated, San Francisco, California,
February 27, 1948.

REGINALD H. LINFORTH,
JAMES I. JOHNSON,
Attorneys for Appellants.

CALKINS, HALL, LINFORTH & CONARD,
Of Counsel.

(Appendices Follow.)



Appendices.

Appendix I

RELEVANT PROVISIONS OF FEDERAL INSURANCE CONTRIBUTIONS ACT.

(From 26 U.S.C.A.—Int. Rev. Code.)

Sec. 1400. Rate of tax.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426 (a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages received during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

Sec. 1401. Deduction of tax from wages.

(a) Requirement. The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

Sec. 1410. Rate of tax.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages paid during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

Sec. 1426. Definitions.

When used in this subchapter—

(a) Wages. The term “wages” means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) That part of the remuneration which, after remuneration equal to \$3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year;

* * * * *

(b) Employment. The term “employment” means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, * * *

* * * * *

(d) Employee. The term “employee” includes an officer of a corporation.

RELEVANT PROVISIONS OF FEDERAL UNEMPLOYMENT TAX ACT.

(From 26 U.S.C.A.—Int. Rev. Code.)

Sec. 1600. Rate of tax.

Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for

each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938. * * *

Sec. 1607. Definitions.

When used in this subchapter—

(a) Employer. The term “employer” does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) Wages. The term “wages” means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

* * * * *

(c) Employment. The term “employment” means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

* * * * *

(i) Employee. The term "employee" includes an officer of a corporation.

Substantially the same provisions were contained in Title VIII and Title IX of the Social Security Act before its amendment.

Appendix II

TREAS. DEPT. REG. 107, SEC. 403.204.

Who are employees.—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word “employer” as used in this section only, notwithstanding the provisions of section 403.201 (a), includes a person who employs one or more employees.)

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent

contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act (see section 403.203).

This Regulation, issued under the Federal Unemployment Tax Act, is substantially the same as that issued under the Federal Insurance Contributions Act and prior regulations issued under the Social Security Act.

Appendix III

AGREEMENT.

THIS AGREEMENT, made and entered into this twenty-eighth day of May, 1940, by and between SAN FRANCISCO NEWSPAPER PUBLISHERS' ASSOCIATION, as the representative and authorized agent of the CHRONICLE PUBLISHING COMPANY, Publisher of SAN FRANCISCO CHRONICLE; HEARST PUBLICATIONS, INC., for the SAN FRANCISCO CALL-BULLETIN Department thereof; DAILY NEWS COMPANY, LTD., Publisher of THE SAN FRANCISCO NEWS; and HEARST PUBLICATIONS, INC., for the SAN FRANCISCO EXAMINER Department thereof, hereinafter referred to collectively as the "PUBLISHERS" and individually as the "PUBLISHER" and the NEWSPAPER AND PERIODICAL VENDORS' AND DISTRIBUTORS' UNION No. 468, affiliated with INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, hereinafter referred to as the "UNION", for itself and as the authorized agent of its members,

WITNESSETH:

The parties hereto hereby agree to and accept all of the terms, provisions, conditions, and definitions hereinafter set forth, to wit:

Section 1. Each of the parties hereto agrees that the intent of this Agreement is to maintain the relationship of seller and buyer, and not the relationship of employer and employee, and neither party hereto will construe anything herein, and nothing herein

shall be construed, otherwise than in accordance with this expression of the intent hereof.

Section 2. This Agreement shall apply to the sale of newspapers of the Publishers by News Vendors coming under the terms of this Agreement in the City and County of San Francisco.

(a) For the sale of evening newspapers in the City and County of San Francisco said City is divided into zones described as follows:

Zone One: Starting at the Embarcadero at Washington Street and continuing out both sides of Washington Street to Van Ness Avenue, thence south on both sides of Van Ness Avenue to Market Street, thence across Market Street to Eleventh Street, thence along both sides of Eleventh Street to Howard Street, thence along both sides of Howard Street to Third Street, thence along both sides of Third Street to Townsend Street, thence along both sides of Townsend Street, including Southern Pacific Station, to the Embarcadero, thence along the Embarcadero to Washington Street, including safety zone intersections.

Zone Two: Starting at the intersection of Washington Street and Van Ness Avenue and extending along both sides of Van Ness Avenue to Bay Street, thence along both sides of Bay Street to Laguna Street, thence along Laguna Street to Chestnut Street, thence along both sides of Chestnut Street to Scott Street and thence returning along Chestnut Street to Fillmore Street, thence along both sides of Fillmore Street to

Haight Street, thence along both sides of Haight Street to Market Street and thence along both sides of Market Street to Van Ness Avenue, thence along the line of Van Ness Avenue to Washington Street; including safety zone intersections.

Zone Two (a): Starting at intersection of Market and Valencia Streets, thence along West line of Valencia Street to Mission, thence along Mission to 29th; thence returning along South line of Mission to Van Ness Avenue South, thence along East line of Van Ness Avenue South to the South line of Market Street, including safety zone intersections.

Zone Three: All that part of the City and County of San Francisco not included within Zone One (1), Zone Two (2) and Zone Two (a).

(b) The Publishers agree that in Zone One contracts for the sale of evening newspapers will during the term of this Agreement be offered to News Vendors coming under the terms of this Agreement (in accordance with provisions of Section 12) and to newsboys under the age of eighteen (18) years in the ratio of five (5) News Vendors to three (3) newsboys and the Publishers will maintain said ratio during said term.

(c) The Publishers agree that in Zone Two (2) contracts for the sale of evening newspapers will during the term of this Agreement be offered to News Vendors coming under the terms of this Agreement (in accordance with provisions of Section 12) and to newsboys in the ratio of one (1) News Vendor to two

(2) news boys and the Publishers will maintain said ratio during said term.

(d) In Zone Two (a) The Publishers will offer contracts for the sale of evening newspapers to News Vendors coming under the terms of this Agreement and to newsboys in the ratio of one (1) News Vendor to thirteen (13) newsboys and the Publishers will maintain said ratio during said term.

(e) In Zone Three the Publishers will offer contracts for the sale of evening newspapers to News Vendors coming under the terms of this Agreement and to newsboys without any limitation as to ratio between News Vendors coming under the terms of this Agreement and newsboys.

(For the sole purpose of checking the observance of the ratio of News Vendors to newsboys established in Zones One, Two and Two (a), the Publishers agree upon request to furnish a list of newsboy corners and News Vendor corners in such Zones and further agree to notify the Union promptly when changes are made in such list.)

(f) On both morning and evening newspapers whenever the weekly profits of a newsboy on any corner shall equal or exceed the Part Time Corner weekly guarantee in this Agreement provided for, such newsboy shall be replaced by a Part Time Corner News Vendor, a member of the Union in good standing and acceptable to the Publisher or Publishers, who is available, and further provided that if the replacement so made shall result in exceeding the ratio of

Part Time to Full Time Corners fixed by Section 14 of this Agreement, such replacement shall be designated a "temporary Part Time Corner News Vendor".

Section 3. (a) The Publishers and the Union agree that for the sale of morning newspapers (Sunday excepted) in the City and County of San Francisco each Publisher of a morning newspaper may enter into contracts with not to exceed a total of 80 newsboys to cover the sales of both the a.m. and p.m. selling periods.

(b) In the application and interpretation of this section, it is agreed that newsboys shall sell either on the basis of joint representation or exclusive representation (as the publisher and/or publishers shall determine) provided, that in the event a newsboy sells on the basis of joint representation that such newsboy shall count as one (1) of the newsboys for each of the morning newspapers.

Section 4. (a) For the sale of Sunday newspapers in the City and County of San Francisco, both publishers of Sunday newspapers may enter into contracts with not to exceed a combined total of 175 newsboys to cover the sales of both the Saturday night and Sunday morning selling periods; provided, that newsboys shall sell either on the basis of joint representation or exclusive representation (as the publisher and/or publishers shall determine); but in no event shall the combined total of newsboys for the sale of both Sunday newspapers on Saturday night and Sunday morning exceed 175.

(b) For the sale of morning and Sunday newspapers, newsboys shall not sell on the same corner of an intersection in direct competition with the News Vendor.

(c) It is further agreed that each publisher of a Sunday newspaper may enter into contracts for the sale of Sunday newspapers with junior sales boys without limitation as to number, provided such junior sales boys shall sell at large and shall not remain stationary on any corner.

Section 5. For the sole purpose of checking the observance of the limitation of newsboys of morning newspapers as established in Sections 3 and 4, the Publishers agree upon request to furnish a list of newsboy corners and further agree to notify the union promptly when changes are made in such list.

Section 6. The News Vendors who come under the terms of this Agreement are those who shall engage in the sale of newspapers of the Publishers as hereinafter provided for under the terms of Section Thirteen (13) hereof.

Section 7. The Publishers recognize the Union as the sole collective bargaining agency for all News Vendors coming under the terms of this Agreement.

Section 8. The newspapers of each Publisher on a daily or Sunday paper shall be sold at the retail price established by such Publisher.

Section 9. (a) Newspapers shall be purchased from each Publisher at the wholesale price established by each Publisher for the newspapers which it pro-

duces and payment to each Publisher for any newspapers so purchased shall be made at said wholesale price. It is agreed that the present practice of making payment toward the end of the selling period or after each edition shall be continued.

(b) Each Publisher agrees that its wholesale price so established shall be uniform to News Vendors selling single copies on the public streets of the City and County of San Francisco and such wholesale price shall not be lower to any other selling agency ("carriers" excepted) in said City and County. It is agreed that Publishers' sale to "carriers" for delivery to subscribers shall not be subject to the provisions of this Agreement. Sales to "carriers" for sales of single copies on the public streets of the City and County of San Francisco shall, however, be subject to all the provisions of this Agreement.

Section 10. The Publishers agree that during the term of this agreement the retail price of newspapers herein specified shall not be changed and that the wholesale price of Three (\$3.00) Dollars per hundred for newspapers retailing at Five (.05) cents a copy or Seven and 50/100 (\$7.50) Dollars for Sunday newspapers retailing at Ten (.10) Cents per copy shall not be changed.

Section 11. The profit arising from the difference between the retail prices and the wholesale prices shall belong to the News Vendor.

Section 12. When there exists a vacancy at any corner as defined in Sections 13, 14 and 15, preference shall be given to any available member of the Union

in good standing acceptable to the Publisher or Publishers concerned. The Publisher agrees to notify the Union when a vacancy exists, giving the location of such corner, and at the time such notice is given, the Union agrees to furnish a list of all available News Vendors. The Publisher or Publishers shall have the right of selection from all available News Vendors. If no member of the Union, acceptable to the Publisher or Publishers concerned, is available when a vacancy exists, such Publisher or Publishers may enter into a contract for the sale of newspapers with any person and such person may continue with said contract for the sale of newspapers until such time as a member of the Union, acceptable to the Publisher or Publishers concerned, is available. Upon the happening of which event the Publisher or Publishers will offer to said member of the Union a contract to sell newspapers, provided, however, that such Publisher or Publishers shall not be required to terminate its contract with any person not a member of the Union who has a contract to sell newspapers, before the end of the current day or night period, during which he is selling under such contract.

(It is agreed that when in the opinion of the Union a Publisher and/or Publishers has determined that a News Vendor is unacceptable, that the Publisher and/or Publishers will discuss the reason therefor with the Business Agent of the Union and if Agreement is not mutually reached it shall be settled by the Standing Committee, or by an Arbitration Board which has full power to determine the acceptability of said News Vendor.”)

Section 13. (a) A "News Vendor" is hereby defined to be a person over the age of eighteen (18) years who purchases newspapers at wholesale from a Publisher or Publishers, and resells the same at retail at a Full Time Corner, or Part Time Corner, or Special Wrapped Edition Corner, or Special Event Corner, or at large under the terms of this Agreement. A "Newsboy" is hereby defined to be a person under the age of eighteen (18) years of age who purchases newspapers at wholesale and resells same at retail on corners as designated and limited by the Publisher.

(b) A "Full Time Corner" is hereby defined to be a location on the public streets of the City and County of San Francisco as designated and limited by a Publisher or Publishers at which a News Vendor actually offers newspapers for sale at retail—

1. For the sale of evening newspapers forty-six (46) hours each week of six (6) days, such hours to be divided at the Publisher's discretion, provided the Publisher shall not designate any such hours to exceed eight (8) hours within nine (9) consecutive hours in any one day;

2. For the sale of morning newspapers forty-six (46) hours each week of six (6) days, such hours to be divided at the Publisher's discretion, provided, however, that on four (4) week days the maximum hours shall not exceed seven (7) hours within eight (8) consecutive hours and on Saturdays and Sundays the hours shall not exceed Ten (10) hours within eleven (11) consecutive hours.

(c) A "Part Time Corner" is hereby defined to be a location on the public streets of the City and County of San Francisco as designated and limited by a Publisher or Publishers at which a News Vendor actually offers newspapers for sale at retail during four (4) consecutive hours or less, at the Publisher's discretion each day, at least six (6) days of each week. The Publisher or Publishers (if such Part Time Corner be a consolidated corner) may establish the daily hours during which sales of newspapers shall be made at such Part Time Corner.

(d) The Publisher or Publishers, as the case may be, shall designate and limit in its or their discretion, Corners as either a Full Time Corner, a Part Time Corner, a Special Wrapped Edition Corner or a Special Event Corner, provided that nothing herein contained shall be construed to prohibit changing the designation of a Corner from a Full Time Corner to a Part Time Corner, or from a Part Time Corner to a Full Time Corner, or to prohibit the discontinuance of any Full Time Corner or any Part Time Corner, or the re-establishment of any Full Time Corner or Part Time Corner, at the discretion of the Publisher or Publishers.

(e) A "Special Wrapped Edition Corner" is hereby defined to be a location on the public streets of the City and County of San Francisco as designated and limited by a Publisher at which a News Vendor actually offers a Special Wrapped Edition of a newspaper for sale at retail during a temporary period of time to be established by the Publisher con-

cerned. The Publisher may fix the daily hours during which sales of such Special Wrapped Edition shall be made at any Special Wrapped Edition Corner at not to exceed eight (8) hours within nine (9) consecutive hours.

(f) A "Special Event Corner" is hereby defined to be a location at or near the place of holding a sporting event, civic celebration or public gathering, in the City and County of San Francisco as designated and limited by a Publisher or Publishers at which a News Vendor actually offers newspapers for sale at retail. The Publisher (or Publishers, if such Special Event Corner be a consolidated Special Event Corner) may establish the hours during which sales of newspapers shall be made thereat; provided, the period of time a News Vendor sells newspapers at a Special Event Corner shall be in units of four (4) hours.

(g) A "Roving News Vendor" (bootjacker) is hereby defined to be a News Vendor coming under the terms of this Agreement who sells newspapers on the public streets of the City and County of San Francisco at retail at large. The Publisher shall designate the periods and hours when and at which newspapers are to be offered for sale at large; provided, the period of time a Roving News Vendor sells newspapers shall be in units of four (4) hours.

(It is agreed that if the Union cannot upon request furnish Roving News Vendors under the terms of this Agreement, the Publisher may enter into a contract

for the sale of newspapers at large with any person and such person, with the exception of the provisions of Section 9 (b), need not come under the terms of this Agreement and such Publisher shall not be required to terminate such contract before the end of a four (4) hour selling period, except that for the extra sale of the Monday morning newspapers on Sunday afternoon and evening only, each morning newspaper will notify the Union of the number of Roving News Vendors that will be desired and will give to the Union four days' notice of any change in that number, and any adjustment of the profit guaranteed such Roving News Vendors shall be paid by not later than the Thursday following such sale.)

Section 14. The Publisher (or Publishers, if such corner be a consolidated corner) shall designate each Corner whether Full Time, Part Time, Special Wrapped Edition Corner, or a Special Event Corner where the newspapers produced by it or them shall be sold, and each of said Publishers shall in its or their discretion contract for the sale of said newspapers (other than Special Wrapped Edition) upon a basis of exclusive representation or joint representation, as the Publisher (or Publishers as the case may be) shall determine. The Publishers agree that during the term of this Agreement the ratio of Part Time Corners to Full Time Corners shall not exceed one such Part Time Corner to every three Full Time Corners.

Section 15. Each Publisher may discontinue sales to any News Vendor and discontinue or withdraw

from participation in any Full Time Corner or Part Time Corner, and may contract for sales at any new Full Time Corner or Part Time Corner which it may from time to time select.

Section 16. (a) Each Full Time Corner News Vendor who sells newspapers at retail at a Full Time Corner—

1. For the sale of evening newspapers forty-six (46) hours each week of six (6) days as set forth in Section 13 (b), Paragraph 1,

2. For the sale of morning newspapers forty-six (46) hours each week of six (6) days as set forth in Section 13 (b), Paragraph 2,

shall be guaranteed a minimum weekly profit of Nineteen (\$19.00) dollars by the Publisher (or Publishers jointly if the corner be a consolidated corner) whose newspapers he sells.

(b) Each Part Time Corner News Vendor who sells newspapers at retail at a Part Time Corner during four (4) consecutive hours or less, at the Publisher's discretion each day at least six (6) days of each week and complies with all provisions of this Agreement relating to Part Time Corners shall be guaranteed a total weekly profit of Thirteen-fifty (\$13.50) Dollars by the Publisher (or Publishers jointly if the corner be a consolidated corner) whose newspaper he sells.

(c) Any Full Time Corner or Part Time Corner News Vendor may at his discretion answer a call-

back and when such News Vendor reports back on any day after completing his regular hours of sale on a corner for the purpose of selling newspapers of the same Publisher and of the same date shall be guaranteed by said Publisher a profit for the period during which he sells newspapers when so called back equal to one-sixth of the Weekly Part Time Corner guarantee; provided, the period of time a News Vendor sells newspapers on a call-back shall be limited to four (4) hours.

(d) Each News Vendor who sells a Special Wrapped Edition at a Special Wrapped Edition Corner, and who complies with all provisions of this Agreement relating to such Special Wrapped Edition Corner, shall be guaranteed for each day that he sells such Special Wrapped Edition, by the Publisher whose Special Wrapped Edition he sells, a profit equal to one-sixth ($1/6$) of the weekly profit guaranteed Full Time Corner News Vendors, as hereinabove in this section provided.

(e) Each Special Event Corner News Vendor who sells at a Special Event Corner and complies with all provisions of this Agreement relating to Special Event Corners shall be guaranteed for each period of time for which he sells newspapers of one date a profit equal to one-sixth ($1/6$) of the weekly part time corner guarantee by the Publisher (or Publishers jointly if the Special Event Corner be a consolidated Special Event Corner) whose newspapers he sells.

(f) Each Roving News Vendor who complies with all the provisions of this Agreement relating to sales

of newspapers at retail at large shall be guaranteed for each period of time during which he sells newspapers of one date, by the Publisher whose newspapers he sells, a profit equal to one-sixth ($1/6$) of the weekly Part Time Corner guarantee, provided such period of time during which he sells newspapers of one date shall not exceed four (4) consecutive hours.

Section 17. The Publishers agree that they will deliver newspapers to News Vendors coming under the terms of this Agreement at all Full Time, Part Time, Special Event or Special Wrapped Edition Corners, except that point of delivery may be at any corner of an intersection, and except further that News Vendors selling newspapers within a radius of three (3) blocks of the publication plant of a newspaper (Special Wrapped Edition Corner excepted, provided they are not just outside the building) may at the discretion of the Publisher concerned be required to take delivery of the first selling edition of the newspaper to be sold by the News Vendor at the publication plant of the Publisher. All checking in shall be at the Corner at which the News Vendor is selling, except that one Corner of an intersection may be designated by the Publisher as a checking in point for all the Corners of an intersection.

Section 18. It is agreed that any News Vendor who has a contract to sell newspapers shall receive from the representative of the Publisher or Publishers whose newspapers he sells a sales slip at the completion of each day showing total papers received and total net sales for that day. Such sales slip shall

be recognized by the Publisher or Publishers as constituting a correct sales record for the day. Such sales slip shall be furnished to the News Vendor at the Corner at which he sells newspapers except that one corner of an intersection may be designated by the Publisher as a point to furnish the sales slip for all the Corners of an intersection.

Section 19. All unsold complete newspapers shall be returned to the Publisher's representative in accordance with the requirements of the Publisher, and if so returned by the News Vendor to whom they were sold by the Publisher, shall be credited to such News Vendor at the wholesale price, such credit to be given at the settlement of each day's sales.

As an interpretation of this Section, it is mutually agreed that:

1. Any News Vendor who has a contract to sell newspapers is entitled to have any newspapers which he has received on a given day from the representative of the Publisher or Publishers whose newspapers he sells and which remain unsold returned to and checked in by a representative of the Publisher or Publishers whose newspapers he sells at the completion of that day. Such picking up and checking in of unsold newspapers shall be done at the Corner at which he sells newspapers, except that one corner of an intersection may be designated by the Publisher as a point for picking up and checking in for all the corners of an intersection.

2. Whenever it shall appear as a matter of fact that it is not reasonably possible for the hours of a

News Vendor to be scheduled so as to carry out the spirit of this section without denying the Publisher or Publishers the right to the hours of representation by the News Vendor as provided for in the Agreement, then the News Vendor shall elect one of the following alternatives:

(a) The News Vendor may make payment toward the end of the selling period, or after each edition as provided in Section 9 (a), for the newspapers received during the day and he shall continue to offer newspapers for sale within not less than fifteen minutes of the completion of the scheduled day's selling period before leaving his Corner and he shall be responsible for unsold papers and he shall return them and receive his sales slip on the following day.

(b) The News Vendor may require a representative of the Publisher or Publishers whose newspapers he sells to check in his unsold papers before the completion of the day and have deducted from the amount which he would otherwise earn or would otherwise be due him at the end of the week a pro-rated amount which shall be determined by the following formula in which "X" equals the amount to be deducted.

S	(Time to which Publisher(s) is entitled—Time Worked)
<hr/> The amount of the guaranteed minimum weekly profit.	<hr/> Time to which Publisher(s) is entitled.

Section 20. Nothing in this Agreement contained shall be construed to prohibit the use by a Publisher

for the sale of its newspapers of coin racks or mechanical devices or other means or agencies of any kind, provided that as long as the sale of such Publisher's newspaper at a corner shall yield a weekly profit equal to or in excess of 50% of the Part Time Corner guarantee provided for in this Agreement, the Publisher shall not replace a News Vendor with any coin rack or device.

Where there is one News Vendor at an intersection he may operate any coin racks or mechanical devices placed upon the other corners of such intersection for the sale of the newspapers which he sells. Where there is more than one News Vendor at such intersection the Publisher may select the News Vendor who shall operate said coin racks or mechanical devices, provided that no News Vendor shall be required by a Publisher to operate any coin rack or mechanical device, but upon agreeing to do so a News Vendor shall be responsible for all newspapers of the Publisher placed by him thereon. If no News Vendor shall elect to operate coin racks, or mechanical devices placed on other corners as herein contemplated, the Publisher may at its option operate the same.

Any News Vendor who is provided with stands, racks or mechanical devices by a Publisher or Publishers shall not place thereon anything other than newspapers (regular rack cards excepted) which he has a contract to sell.

Section 21. News Vendors shall sell complete newspapers only with all sections thereof in such order

as the several Publishers may designate, and shall assemble newspapers as may be necessary to fulfill this requirement, provided that the Publishers agree that the Sunday newspapers will be delivered in not more than two parts and the daily newspapers will be delivered in one part except that not to exceed three times during each year of this contract daily newspapers may be delivered in two parts.

Section 22. Subject to the observance of all of the terms of this Agreement the Union agrees that it will not interfere with the sale of newspapers of the Publishers through any outlet over which the Union has no jurisdiction.

Section 23. The Publishers agree that as to News Vendors coming under the terms of this Agreement, neither activity in nor on behalf of the Union nor political nor fraternal affiliations nor membership in the Union shall be considered grounds for discrimination on the part of the Publishers in dealing with News Vendors, members of the Union.

Section 24. (a) No car hopping shall be permitted unless the Publishers and the Union agree otherwise as to exceptions to this rule.

(b) Nothing herein contained shall be construed to require members of the Union to accept contracts for the sale of both morning and evening newspapers.

Section 25. When a News Vendor is selected and reports but the Publisher fails to supply him with papers for resale, he shall be entitled to receive a

guaranteed sum equal to one-sixth ($\frac{1}{6}$) of the weekly profit guaranteed at such corner.

Section 26. The six (6) days which the Full Time or Part Time Corner News Vendor offers newspapers for sale shall be designated by the Publisher, provided, that morning newspapers shall designate the six (6) days to include Saturday and Sunday, unless otherwise agreed upon by the Publisher and/or Publishers and the Union. The Publisher shall give to the News Vendor twenty-four hours' notice of any change of such schedule.

Section 27. The hours during any day or night during which a Full Time Corner News Vendor shall offer newspapers for sale shall be designated by the Publisher provided such News Vendor shall not be required to sell more than five hours without a period of absence from a Corner, except as may be necessary for physical relief; provided further, that as designated by the Publisher, the News Vendor shall have the privilege of taking the full hour period at one time, and that such designated hour period shall be the same for at least one (1) week.

Section 28. (a) In the event a News Vendor desires to discontinue temporarily the sale of newspapers and has good and just cause, the Publishers shall grant in writing a suspension of his contract for a period of discontinuance involved and upon the expiration of such period will renew his contract at his former location, provided he is physically able. Such

period may be extended by mutual agreement between the News Vendor and Publisher.

(b) A News Vendor elected or appointed to office in the Union shall be granted a suspension of his contract for the duration of service on behalf of the Union and the Publisher will renew his contract at his former location upon expiration of such service.

Section 29. (a) News Vendors shall be accountable to the Publisher or Publishers only for newspapers consigned to them and no charge either direct or indirect, other than the wholesale rate for newspapers shall be made to News Vendors for any purpose; provided, any charge for postage on Special Wrapped Editions shall be collected by the News Vendor and remitted to the Publisher or Publishers concerned.

(b) News Vendors shall not be required to offer for sale early editions until his supply of later editions has been sold.

Section 30. The Publishers agree to deal with the business agent of the Union or his authorized representative as the official representative of News Vendors coming under the terms of this Agreement. Each Publisher shall designate one representative on the day side and/or one representative on the night side who shall handle in the first instance such business, disputes, or grievances as may develop.

Section 31. (a) Any News Vendor assigned to a Full Time or Part Time Corner or Corners shall not

be changed from one Corner to another for a period of at least one (1) week unless a change is made by mutual consent between the Union and the Publisher or Publishers concerned.

(b) In event a Publisher discontinues sale of newspapers to any Full Time or Part Time Corner News Vendor, said Publisher shall notify the News Vendor to this effect before or at the completion of his regular selling time on the day or night prior to such discontinuance unless such discontinuance is for cause. The reason or reasons for such discontinuance shall upon request of the Union, be set forth in writing by the Publisher or the Circulation Manager within 72 hours thereafter.

(c) Any News Vendor who has a contract to sell newspapers and who is unable to sell newspapers on any day or night, shall so notify the office of the Publisher or Publishers whose newspapers he sells at least thirty (30) minutes prior to his selling time unless, due to circumstances beyond News Vendor's control it is impossible to give such notice.

(d) In event any Full Time or Part Time Corner News Vendor becomes ill while selling newspapers on any day or night and because thereof it is necessary that the News Vendor vacate his Corner, such News Vendor shall notify the office of the Publisher or Publishers whose newspapers he sells unless due to circumstances beyond News Vendor's control it is impossible to give such notification.

Section 32. The Publishers agree that payment of guarantees shall be made to the News Vendor not later than Wednesday for evening newspapers and not later than Thursday for morning newspapers and that consolidated guarantees shall be made through a consolidated office. In the event of a dispute arising over a guarantee, payment of same shall be withheld until both parties mutually agree upon its adjustment—at which time settlement shall be made.

Section 33. If the Publishers require any special equipment for the proper handling, display and sale of newspapers, said Publishers agree to supply same without cost.

Section 34. Any News Vendor who feels his contract has been unjustly discontinued shall have the right to appeal to the Standing Committee hereinafter provided.

Section 35. News Vendors coming under the terms of this Agreement and selling any newspaper or newspapers produced by the Publisher or any of them and at the same time offering for sale other newspapers, magazines, or publications shall not be guaranteed any profit under the provisions hereof.

Section 36. All disputes arising out of the operation of this Agreement, all disputes regarding the interpretation of any portion of this Agreement, all disputes between any Publisher and any member of the Union (except as in this Section provided) which cannot be settled directly between representatives of the Union and the Publisher or Publishers concerned shall

be submitted to a Standing Committee which shall be appointed within five (5) days after the execution of this Agreement. The Standing Committee shall consist of two (2) representatives of the Publishers and two (2) representatives of the Union, which representatives shall be appointed by their respective organizations. In case of a vacancy on said Standing Committee from any cause, said vacancy shall be filled immediately by the appointment of a new member by the party in whose representation on the Standing Committee the vacancy occurs.

When disputes arise the party desiring a meeting (for the purpose of considering such dispute) shall give notice through its authorized representative to the other party in writing that a meeting is desired. The parties shall then meet within twenty-four (24) hours after receipt of such notice and shall proceed forthwith to attempt to settle any question raised in the written notification. If the parties concerned are unable to agree within twenty-four (24) hours thereafter the matter shall then within twenty-four (24) hours be referred in writing to the Standing Committee as hereinbefore provided.

The Standing Committee shall meet within five (5) days after receipt of such notice given by either party hereto and shall proceed forthwith to settle any dispute raised in the original notification.

It is understood and agreed that the Standing Committee is established by the terms of this Agreement for the settlement of all disputes which cannot be settled directly by the affected parties and that the

Standing Committee is the proper body to settle them finally in the manner herein provided.

The Standing Committee shall have no jurisdiction over the settlement of any new Agreement but said committee shall have complete jurisdiction over all differences as hereinbefore enumerated.

It shall require the affirmative votes of four (4) members of the Standing Committee to decide the issue. Decisions of the Standing Committee shall be final and binding on the parties hereto and such decisions shall be recorded in writing and signed by representatives of both parties hereto.

If the Standing Committee cannot reach an agreement on any dispute within five (5) days (this time may be extended by unanimous agreement) from the date on which a dispute is first considered by it, at the request of either party hereto, the members of the committee shall form a Board of Arbitration and shall select a fifth member, who shall be a disinterested party and who shall act as chairman of the board.

The Board of Arbitration thus formed shall proceed with all dispatch possible to settle the dispute.

It shall require the affirmative votes of at least three (3) of the five (5) members of the Board of Arbitration to decide the issues, and the decision of the Board of Arbitration in all cases shall be final and such decision shall be binding on the parties hereto. Any expenses incurred jointly through arbitration shall be shared equally by the Publishers and the Union.

Within thirty (30) days after signing this Agreement the Standing Committee shall agree upon a panel of three disinterested persons, to serve as arbitrators when called upon in accordance with provisions elsewhere set forth in this Section. Provided, that if the panel of three has not been completed within the time limit provided, then the selection shall be made by Judge Walter Perry Johnson, San Francisco, who shall select said men.

Section 37. This Agreement shall be in full force and effect for a period of two (2) years on and after the third day of June, 1940 and thereafter until a new contract has been agreed upon within the limitation hereinafter set forth.

If upon the anniversary date of this Agreement, either party wishes to propose a change in the guaranteed weekly minimums and/or hours, said party shall present written notice stating guaranteed weekly minimums and/or hours proposed sixty (60) days prior to June 3, 1941. The said notice, if served, to be accompanied by a detailed statement of changes desired. The party upon whom the original demand is made may present a counter proposal at any time within fifteen (15) days after such notice has been received and meetings to discuss the proposal or proposals shall begin within twenty (20) days after the original notice has been received. If no counter proposal be filed, the existing contract shall be considered to be the respondent party's counter proposal. If notice is served the guaranteed weekly minimums

that may be mutually agreed upon shall cover the full year immediately following the anniversary date of this Agreement. If notice is not given by one of the parties, as herein in this paragraph described, it shall be construed that the guaranteed weekly minimums and/or hours set forth in this Agreement shall be in effect during the life of this Agreement.

Either party desiring to amend the terms of this Agreement upon its expiration date shall give the other party sixty (60) days' notice to this effect in writing on any date after April 3, 1942. Such notice to be accompanied with a detailed statement of changes desired. The party upon whom the original demand is made may present a counter proposition at any time within thirty-five (35) days after such notice has been received. If no counterproposal be filed, the existing Agreement shall be considered to be the respondent party's counter proposal.

IN WITNESS WHEREOF, the said parties, by their representatives duly authorized to act, have hereunto set their hands and seals the day and year first above written.

San Francisco Newspaper Publishers'
Association

By E. F. Bitler

Chronicle Publishing Company, Publisher
of San Francisco Chronicle

By C. E. Gilroy

Hearst Publications, Inc., for the San
Francisco Call-Bulletin Department
thereof

By Presley Mallory

Daily News Company, Ltd., Publisher
 of The San Francisco News
 By John Vanbenthem

Hearst Publications, Inc., for the San
 Francisco Examiner Department thereof
 By J. B. Casaday

Newspaper and Periodical Vendors'
 & Distributors' Union No. 468,
 I.P.P. & A.U.

By Andrew J. McNamee

By Chas. H. Bowers

By A. J. Kallok

By Phil Fillbach

By G. J. Moriarity

The International Printing Pressmen and Assistants' Union of North America, by its President, duly authorized to act in its behalf, hereby underwrite the obligations assumed by the party of the second part under this agreement, and guarantees their fulfillment.

Geo. L. Berry,
 President International Printing
 Pressmen and Assistants' Union
 of North America

Nos. 11,781, 11,782, 11,783, 11,784

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED,

a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

THE CHRONICLE PUBLISHING COMPANY,

a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR APPELLEE.

THERON LAMAR CAUDLE,

Assistant Attorney General,

SEWALL KEY,

A. F. PRESCOTT,

ARTHUR L. JACOBS,

Special Assistants to the Attorney General.

FRANK J. HENNESSY,

United States Attorney,

WILLIAM E. LICKING,

Assistant United States Attorney.



Subject Index

	Pages
Opinion below	1
Jurisdiction	2
Question presented	3
Statutes and regulations involved	3
Statement	3
Summary of argument	11
Argument:	
I. The judicial authorities compel the conclusion that the news vendors are employees	12
II. The material factors applied to the established facts compel the conclusion that the news vendors were employees	25
A. The control factor	25
B. Opportunities for profit and loss	32
C. The investment factor	33
D. Permanency of relationship	33
E. Skill required	34
F. The integration factor	34
G. The right to terminate the relationship	41
H. The guaranteed earnings	41
I. The parties to the contract	41
J. The news vendor was not a purchaser of the news-paper	43
III. The news vendors are employees as a matter of "economic reality"	46
Conclusion.....	48
Appendix	i-iv

Table of Authorities Cited

Cases	Pages
Andrews v. Commodore Knitting Mills, 257 App. Div. 515	31
Atlantic Coast Life Ins. Co. v. United States, decided January 16, 1948	15, 21
Bartels v. Birmingham, 332 U. S. 126	13, 14, 15, 45, 46
Broderick, Henry, Inc. v. Squire, 163 F. 2d 980.....	14, 19
Brown v. Industrial Acc. Comm., 174 Cal. 457	30
Buell, Robert C. & Co. v. Denaher, 127 Conn. 606	24
Cal. Emp. Comm. v. L. A. Down Town Shopping News Corp., 24 Cal. App. 2d 421	23
California Employment Comm. v. Bates, 24 Cal. 2d 432...	23
Castaldo, In re, 263 App. Div. 758	24
Childers v. Commissioner, 80 F. 2d 27	45
Creameries of America v. Ind. Comm., 98 Utah 571	24
Davidson v. Commissioner, 305 U. S. 44	45
Eagle v. Industrial Comm., 221 Wis. 166	31
Electrolux Corp. v. Board of Review, 129 N.J.L. 154.....	24
Electrolux Corp., Matter of, 288 N. Y. 440	24
Fahs v. Tree-Gold Cooperative Growers of Florida, Inc., decided February 3, 1948	14, 18
Fisher v. Industrial Commission, 301 Ill. 621	31
Foy, In re, 10 Wash. 2d 317	24
Franklin Coal Co. v. Industrial Commission, 296 Ill. 329...	31
Glenmore Securities Corp. v. Commissioner, 62 F. 2d 780, certiorari denied, 289 U. S. 754	45
Globe Grain & Milling Co. v. Ind. Comm., 98 Utah 36, modified at rehearing, 98 Utah 48	24
Hampton v. Macon News Printing Co., 64 Ga. App. 150...	23, 43
Hearst Publications v. National L. Relations Board, 136 F. 2d 608	32
Jack and Jill, Inc. v. Tone, 126 Conn. 114	24
Johnson v. Altmeyer, 63 F. Supp. 796	22

TABLE OF AUTHORITIES CITED

iii

	Pages
Jones v. Goodson, 121 F. 2d 176	31
Journal Pub. Co. v. State Unemployment Comp. Com'n, 175 Ore. 627	23, 37, 43
Laber Board v. Hearst Publications, 322 U. S. 111.....	
.....	13, 16, 17, 27, 29, 32, 40, 42
Leinbach Co. v. Unem. Comp. Board, 146 Pa. Super. 237..	24
Los Angeles Athletic Club v. United States, 54 F. Supp. 702, appeal dismissed, 144 F. 2d 352.....	41
Mateovich v. Anglim, 134 F. 2d 834, certiorari denied, 320 U. S. 744	26, 45
Moorman Mfg. Co. v. Industrial Commission, 241 Wis. 200	24
Morton, Matter of, 284 N. Y. 167	24
Murphy v. Daumit, 387 Ill. 406	24
Pacific Emp. Ins. Co. v. Indus. Acc. Com., 3 Cal. 2d 759..	22
Peasley v. Murphy, 381 Ill. 187	31
Rutherford Food Corp. v. McComb, 331 U. S. 722.....	
.....	13, 14, 25, 35, 36, 40, 45
Salt Lake Tribune Pub. Co. v. Industrial Comm., 99 Utah 259.....	22, 23, 43
Scatola, Matter of, 282 N. Y. 689	22
Schomp v. Fuller Brush Co., 124 N.J.L. 487, affirmed, 126 N.J.L. 368	24
Schwing v. United States, 165 F. 2d 518	14, 18
Singer Sew. Mach. Co. v. State U. C. C., 167 Ore. 142.....	24
Sisk v. Arizona Ice & Cold Storage Co., 60 Ariz. 496	24, 40
State v. Superior Court for Thurston County, 22 Wash. 2d 811	24
Stone v. United States, 55 F. Supp. 230	22
Tapager v. Birmingham, decided January 16, 1948.....	15, 22, 36
United States v. Silk, 331 U. S. 704	13, 14, 15, 21, 25, 33
United States v. Wholesale Oil Co., 154 F. 2d 745	29
Van Ogden, Inc. v. Murphy, 390 Ill. 133	24

	Page
Walling v. American Needlecrafts, 139 F. 2d 16	31
Watson v. Commissioner, 62 F. 2d 35	45
Western Express Co. v. Smeltzer, 88 F. 2d 94	31
Western Union Tel. Co. v. McComb, 165 F. 2d 65	40
Whitcher, In re, 263 App. Div. 906	23
Wieder, In re, 266 App. Div. 933, affirmed, 292 N. Y. 609..	23
Wilson v. Times Printing Co., 158 Wash. 95	23
Your Ice Co. v. United States, 57 F. Supp. 830	22

Statutes

Internal Revenue Code:

Sec. 1400 (26 U.S.C. 1940 ed., Sec. 1400)	App. ii
Sec. 1410 (26 U.S.C. 1940 ed., Sec. 1410)	App. ii
Sec. 1426 (26 U.S.C. 1940 ed., Sec. 1426)	App. ii
Sec. 1600 (26 U.S.C. 1940 ed., Sec. 1600)	App. ii
Sec. 1607 (26 U.S.C. 1940 ed., Sec. 1607)	App. ii

Social Security Act, c. 531, 49 Stat. 620:

Sec. 801 (42 U.S.C. 1940 ed., Sec. 1001)	App. i
Sec. 804 (42 U.S.C. 1940 ed., Sec. 1004)	App. i
Sec. 811 (42 U.S.C. 1940 ed., Sec. 1011)	App. i
Sec. 901 (42 U.S.C. 1940 ed., Sec. 1101)	App. i
Sec. 907 (42 U.S.C. 1940 ed., Sec. 1107)	App. i

Miscellaneous

Treasury Regulations 90, Art. 205	App. ii
Treasury Regulations 91, Art. 3	App. iv
Treasury Regulations 106, Sec. 402.204	App. iv
Treasury Regulations 107, Sec. 403.204	App. iv

Nos. 11,781, 11,782, 11,783 and 11,784

IN THE

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For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED,
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Appellant,

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UNITED STATES OF AMERICA,

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THE CHRONICLE PUBLISHING COMPANY,
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vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the Court below is reported in 70
F. Supp. 666. (R. 24-47.)¹

¹All record references will be to the record in No. 11,781 unless otherwise indicated.

JURISDICTION.

These appeals involve the taxes imposed by Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act and the Federal Unemployment Tax Act for the years 1937 through 1940 in the aggregate amount of \$13,447.55.

The taxes in dispute were paid as follows: In No. 11781, \$1,614.49 on February 16, 1942, \$2,531.47 on January 22, 1943, and \$2,187.76 on February 12, 1945; in No. 11782, \$1,207.32 on June 28, 1941, \$408.58 on February 6, 1943, \$409.07 on May 14, 1943; \$408.69 on August 9, 1943, \$408.91 on November 13, 1943, \$409 on February 18, 1944, \$408.96 on May 13, 1944, \$408.96 on August 14, 1944, and \$881.42 on February 3, 1945; in No. 11783, \$421.60 on February 19, 1945, and \$668.06 on February 3, 1945; in No. 11784, \$285.39 on June 27, 1941, \$96.57 on February 5, 1943, \$96.69 on May 14, 1943, \$96.60 on August 9, 1943, \$96.65 on November 13, 1943, \$96.70 on February 18, 1944, \$96.66 on May 13, 1944, \$96.66 on August 14, 1944, and \$111.34 on February 3, 1945. A claim for refund was filed for each payment on the date of payment. The claim for refund of the first payment in dispute in each suit was rejected by notice dated July 13, 1945.

On October 11, 1945, within the time provided by Section 3772 of the Internal Revenue Code, the taxpayers brought four suits in the District Court for the recovery of the taxes and interest paid. (No. 11781, R. 3-4, 9-10, 11, 15-16; No. 11782, R. 4-5, 10-11, 12-13, 14-15, 16-17, 18-19, 20-21, 22-23, 25, 29-31; No.

11783, R. 4, 9, 13, 14; No. 11784, R. 3-4, 9-10, 11, 13, 15, 16-17, 18, 19-20, 21-22, 26-27.)

The jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code. The judgment in each suit was entered on April 29, 1947. (No. 11781, R. 72; No. 11782, R. 32-33; No. 11783, R. 16; No. 11784, R. 28-29.) Within three months thereafter and on July 21, 1947, notice of appeal was filed pursuant to the provisions of Section 128(a) of the Judicial Code, as amended. (No. 11781, R. 77; No. 11782, R. 37; No. 11783, R. 20-21; No. 11784, R. 33.)

QUESTION PRESENTED.

Whether the adult street news vendors engaged in the sale of the taxpayers' newspapers are their "employees" within the Social Security Act.

STATUTES AND REGULATIONS INVOLVED.

These are set forth in the Appendix, *infra*.

STATEMENT.

The essential facts, taken from the findings of the court below, are these:

One of the taxpayers (hereinafter called the publishers), The Chronicle Publishing Company, a California corporation, is the owner and publisher of the

San Francisco Chronicle (hereinafter called the Chronicle), a daily, morning and Sunday newspaper sold in San Francisco, California, and vicinity. The other taxpayer, Hearst Publications, Incorporated, a California corporation, is the owner and publisher of two daily newspapers, the San Francisco Examiner (hereinafter called the Examiner), a daily, morning and Sunday paper, and the San Francisco Call-Bulletin, a daily, evening newspaper sold in San Francisco, California, and vicinity. (R. 63-64.)

During 1938, 1939 and 1940, the Examiner was published and sold in four editions daily, and the Chronicle in five editions daily. A substantial portion of the publishers' circulation is effected through street sales by news vendors. (R. 64.)

For sales by street news vendors, the publishers divide the city into a number of districts. With respect to the Examiner, the city was divided during 1937 to 1940 in districts ranging from ten to twenty. In the case of the Chronicle, the city was divided in eleven districts. Each of the districts contained a number of sales locations, ranging from twelve to thirty. An employee of the publishers called the "wholesaler" is assigned to each district. The Examiner employed approximately forty such "wholesalers". (R. 64-65.)

The chief function of the wholesalers was to deliver the newspapers to the vendors at each edition time, survey their particular district to see if more papers were needed at a particular sales location, to collect from the news vendors for the papers sold, receive

the return of unsold papers and give credit therefor. (R. 65.)

Prior to August 31, 1937, the vendors were engaged by the publishers for the sale of their newspapers at particular corners or sales locations, without written agreement between them. (R. 65.)

After August 31, 1937, the publishers engaged news vendors to sell newspapers at particular sales locations under the terms of written contracts in force after that date between the news vendors' union and the publishers either by oral agreement or by written agreement such as the following (R. 65-66):

The undersigned Publisher (Publishers) and News Vendor hereby agree that said News Vendor shall sell at a (Full) (Part) Time Corner as designated by the Publisher (Publishers) in accordance with the terms of the contract between the San Francisco Newspaper Publisher's Association and the News Vendors' Union No. 20769, American Federation of Labor, dated

.....
Publisher.

.....
News Vendor.

The relationship between the news vendors and the publishers prior to August 31, 1937, was akin to that established by the succeeding written contracts in force after that date between the news vendors' union and the publishers, except as hereinafter indicated and for the exercise of a greater degree of control by the publishers over the activities of the vendors in

matters which were thereafter settled by the terms of the contracts. (R. 66.)

The first written contract between the publishers and the news vendors' union was executed on August 31, 1937, between the San Francisco Newspaper Publishers Association as the representative of the member publishers, including the taxpayers, and Newspaper and Periodical Vendors' and Distributors' Union No. 468, a labor union chartered by the American Federation of Labor, representing the news vendors. Successively, two other contracts were negotiated in 1939 and 1940 which were similar in terms to the first contract. Thereafter, two other contracts were negotiated in 1942 and 1944 and were likewise similar in terms to the first contract. (R. 66.)

The facts pertinent to the relationship between the publishers and the news vendors as fixed by the aforesaid written contracts and as appearing from their actual operation during the period here involved follow. (R. 66-67.)

In each of the union contracts there was contained a clause declaring it to be the intent of the parties to maintain the relationship of seller and buyer between the publishers and the news vendors and not an employer-employee relationship. The clause was inserted at the insistence of the publishers, the vendors agreeing because their primary concern was their economic betterment. (R. 67.)

Prior to 1939, persons wishing to sell newspapers would apply directly to the publishers for assignment

to any vacant sales location. After 1939, the union contracts required that the vendors be selected by the publishers from a list of available vendors furnished on request by the news vendors' union. (R. 67.)

A sales location was defined in the contract as full-time corners, part-time corners, special event corners, and special wrapped edition corners. There were also "bootjackers" or roving vendors, selling newspapers at large. Such locations were designated, limited, changed, discontinued or reestablished entirely at the publishers' direction and in order to coincide with the changing public demand. (R. 67.)

Prior to August 31, 1937, the services of the vendor were terminable at the will of the publisher. Thereafter, a vendor once engaged to sell at a particular location was entitled to man that location so long as it was maintained by the publisher, unless there should arise just cause for the discontinuance of further deliveries, such as drunkenness and failure to appear for work, or for his transfer from one location to another, in which event the publisher was entitled to effect such discontinuance or transfer. If the vendor felt that his contract to sell at a particular location was discontinued by the publisher without cause, he could then have the matter submitted to and determined by arbitration. (R. 67-68.)

The publishers fixed the so-called "retail price" at which the newspapers were to be sold to the public, as well as the so-called "wholesale" price which was the amount payable to the publishers for all newspapers delivered to the news vendors which were not

returned as unsold. Once fixed, such prices remained constant for the duration of the union contract then in force. The difference between the "wholesale" and "retail" price was the vendor's so-called "profit" or earnings. In addition, the news vendor was guaranteed under the terms of the contract a minimum weekly "profit". (R. 68.)

The news vendor makes no payment for the newspapers at the time they are delivered to him for sale. He accounts for all the newspapers delivered either at the end of each edition or near the end of each day's sales period. At that time, he "checks in" or pays to the wholesaler the so-called "wholesale" price for the newspapers delivered to him which he does not return, receives full credit for all unsold papers which are returned, keeps the difference between the amount paid and the amount received as his earnings. (R. 68.)

Within the limits prescribed by the union contracts, the publishers fixed for the various types of corners, the days and hours of sale which the publishers established to coincide with the news releases, the public's reading habits and its concentration at particular locations at particular periods. (R. 68-69.)

As each edition left the press, the newspapers were delivered to the vendors at their corners by the wholesalers. The quantity delivered did not rest in the vendor's discretion but depended upon what it was estimated the vendor, during the selling period, could dispose of at his location. Any disagreement as to the number of newspapers the vendor should take ap-

peared to be a matter for settlement between the publisher and the union. (R. 69.)

In their sale to the public, the vendors were required to sell complete newspapers only in such order as was designated by the publishers, and were not allowed to sell competitive newspapers without the publishers' consent. They were free to offer the papers for sale in the manner they saw fit, except that they were expected to be at their corners at the press release time, to stay there during the sales period, be able to sell papers and to take an interest in selling them. (R. 69.)

The manner in which the news vendors individually could offer the newspapers for sale to the public was so limited and of such nature as not to need control. (R. 69.)

Prior to August 31, 1937, the wholesaler gave orders to the vendors in matters connected with the performance of their duties and disciplined them for failure to comply. Thereafter, the wholesalers kept the news vendors under their surveillance to see that they performed properly, observed their conduct, made suggestions and reported misfeasances to the publishers. In cases of misconduct of vendors warranting dismissal, the wholesaler could "check in" vendors before the end of the day's selling period or report the misfeasance to the publisher, who could then discontinue further deliveries to the vendor involved or report his conduct to the union agents for any disciplining short of discontinuance of deliveries to him. (R. 69-70.)

The vendors have no expenses to bear and assume no risk except the risk of loss of papers delivered to them for sale and charged against them and all losses by reason of their credit selling of newspapers, if any. They provide their own transportation to and from sales locations. (R. 70.)

The vendors were not required to submit any form of report. There were no conferences or sales meetings which they were obliged to attend, nor was it necessary that they report to the publishers' premises for any purpose. (R. 70.)

All advertising placards and display stands or racks were provided by the publishers which bore the publishers' names. The vendors were forbidden to place anything else on the stands or racks except newspapers. (R. 70.)

The news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publisher. (R. 70.)

The vendors were not prohibited from selling non-competitive publications and articles of personal property and some so did. Nevertheless, as to the services performed by the news vendors for the publishers, the same were not incident to the pursuit of a separately established trade, business or profession of the news vendors, involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large. (R. 70-71.)

The services performed by the news vendor were subject to a reasonable measure of general control by the publishers over the manner and means of their performance. (R. 71.)

Upon notice and demand of the Collector of Internal Revenue, the publishers paid the taxes due under Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act and the Federal Unemployment Tax Act measured by the earnings of the news vendors selling their newspapers after April 1, 1937, and through the year 1940. Thereafter, the publishers filed claims for refund and brought these suits for the recovery of the amounts so paid on the grounds that the news vendors were not their employees. (R. 64.)

The four suits were consolidated for trial, after which the Court below determined that the services performed by the news vendors were performed in the "employment" of the taxpayers within those statutes and directed the entry of judgment for the United States. (R. 19, 71.)

SUMMARY OF ARGUMENT.

The interpretation given by the authoritative and controlling cases to the term "employee" as used in the Social Security Act, and the results reached in those cases compel the conclusion that the taxpayers' street news vendors were employees and not independent contractors.

Most, if not all, of the factors material to the determination of whether the employment relationship exists, when applied to the established facts, tend to show the existence of that relationship between the taxpayers and the news vendors.

The news vendors are dependent as a matter of economic reality on the publishers' business to which they render service. Their occupational status is such as to bring them within the remedial purposes of the Act. The news vendors come within the scope of the term "employee" intended by the Act.

ARGUMENT.

I.

THE JUDICIAL AUTHORITIES COMPEL THE CONCLUSION THAT THE NEWS VENDORS ARE EMPLOYEES.

The taxes here involved are imposed with respect to the wages received or paid in "employment". The ultimate question presented is whether the services of the adult street news vendors engaged in the sale of the newspapers published by the taxpayers were performed in "employment" within the meaning of the statutes.

It is the taxpayers' contention that such news vendors were independent contractors and that the Court below erred in holding that the news vendors were their employees.

It is the Government's position that the Court below correctly ruled that the news vendors involved

were the taxpayers' employees within the statutes involved.

The findings of fact of the Court below are virtually unchallenged by the taxpayers. The only findings contested are those with respect to the extent of the control of the news vendors by the publishers and the finding that the street news vendors' services were an integral part of the taxpayers' business operations. Even those objections seem to be directed more to the significance and legal effect given by the Court below to the facts in such findings rather than to their accuracy.

In determining whether the findings support the conclusions of law and judgment entered, and in determining whether such findings and all the undisputed evidence establish that the news vendors are "employees" within the statutes involved, the construction and interpretation of that term, which is undefined in the statute, is controlled by *United States v. Silk*, 331 U. S. 704; *Bartels v. Birmingham*, 332 U. S. 126; *Rutherford Food Corp. v. McComb*, 331 U. S. 722; and *Labor Board v. Hearst Publications*,² 322 U. S. 111.

The *Silk* case determined that the primary consideration in the interpretation and application of the term employee was the effectuation of the well-known purposes and policies underlying the Social Security Act, that the term was not to be applied narrowly or

²All references hereafter to the "*Hearst Publications* case" are intended to refer to the case cited, and not to the two cases at bar brought by the same corporation.

legalistically so as to frustrate those purposes, and that the common law test of the employment relationship (p. 713) "often referred to as the power of control, whether exercised or not, over the manner of performing service" was not applicable. In the *Bartels* case, p. 130, it was made explicit that within the statutes involved "employees are those who as a matter of economic reality are dependent upon the business to which they render service."

In the *Silk* case, the Court said that in determining who were employees within those standards, the degrees of the control, opportunities for profit and loss, investment in facilities, permanency of relation and the skill required in the claimed independent operation were among the factors which should be considered. And in the *Rutherford Food Corp.* case, the Court made it clear that the extent to which the services in question were integrated into the business of the person for whom the services were performed was another material consideration in determining the nature of the relationship. Lastly, it was recognized that the factors stated and considered in those cases were non-inclusive; that no one was controlling, and that it is the total situation in any case that governs. *Silk* case, p. 719; *Bartels* case, p. 130.

These principles and rules have since been expressly recognized and applied in a number of cases involving the same general question, such as *Henry Broderick, Inc. v. Squire*, 163 F. 2d 980 (C.C.A. 9th), and more recently *Schwing v. United States*, 165 F. 2d 518 (C.C.A. 3d); *Fahs v. Tree-Gold Cooperative Growers*

of *Florida, Inc.* (C.C.A. 5th), decided February 3, 1948 (1 C.C.H. Unemployment Insurance Service, par. 9332); *Tapager v. Birmingham*, 75 F. Supp. 375 (N.D. Iowa) and *Atlantic Coast Life Ins. Co. v. United States* (E.D. S.C.), decided January 16, 1948 (1 C.C.H. Unemployment Insurance Service, par. 9329).

Obviously, the position taken by the taxpayers in the Court below, that the common law test of the employment was applicable, is no longer tenable. Now, the taxpayers' brief pays lip-service to the authority of the *Silk* decision, but endeavors to explain the *Silk* case in a manner so as to have this Court still determine the question presented on the common law concept of the employment relationship. It is said in the taxpayers' brief (p. 13) that the ordinary factors applied at common law still are the "important" ones, but that in applying these factors "technical concepts" should not be controlling.

The Supreme Court expressly recognized—and the Government has never contended otherwise—that control, which was the dominant or critical factor at common law, should still be considered. But the taxpayers' interpretation of the *Silk* case is unfounded. The factors enumerated in the *Silk* case were not urged by the taxpayers in the Court below and there is nothing in the *Silk* case from which it could be said that the Court was simply applying common law standards. The taxpayers have not noted that the "technical concepts" referred to in the *Silk* case were, as the Court explained (p. 713) "often referred to as power of control", the test which was rejected. See also *Bartels v. Birmingham*, 332 U. S. 126, 130.

The taxpayers' real position is disclosed from the argument predicated upon the fact that Congress amended the definition of the term employee in the Wagner Act to exclude "independent contractors" based upon a criticism of the Supreme Court decision in *Hearst Publications*, supra. From this, it is argued that to sustain the decision below would extend the Social Security Act beyond the intent of Congress, and "hence, be judicial legislation." (Br. 36.) The argument is tantamount to asking this Court to judicially legislate. It asks this Court to ignore, in effect, the *Silk* case, and judicially reach a conclusion in the application of the Social Security Act which could only be obtained by legislation in the application of the counterpart provision of the Wagner Act.

The Government maintains that the taxpayers' relationship with their news vendors might well be considered employment even within the limited scope of that term as determined by common law standards and tests.³ And, applying the principles announced in the *Silk* and *Bartels* cases to the established facts and giving full effect to the decision in *Labor Board v. Hearst Publications*, supra, we submit that the Court below could not have correctly reached any other conclusion.

In the *Hearst Publications* case, the Labor Board had determined that street news vendors, selling newspapers under essentially the same circumstances as those involved herein, were employees within the

³See concurring opinion of Mr. Justice Reed in the *Hearst Publications* case, p. 135.

National Labor Relations Act. The Supreme Court upheld that determination because it had warrant in the record and a reasonable basis in law. (R. 32.) However, it is apparent from that Court's opinion that there was, as stated by the Court below, "whole-hearted approval" of that determination. (R. 38.) The facts herein are even less favorable to the publishers' position than they were in the *Hearst Publications* case. The issues of fact so vigorously contested in the *Hearst Publications* case, such as the right of the publisher to control the hours of work, are here resolved by the contract between the union and the publishers. (Ex. 41, Sec. 27.)⁴ In these cases the news vendors have no interest in the sales locations on which they sell those papers that would permit their purchase and sale, as was true in the *Hearst Publications* case. Moreover, the feature of the guaranteed earnings present in the contract between the union and the publishers here involved certainly was not present in the *Hearst Publications* case. The only fact present in the *Hearst Publications* case detrimental to publishers' position not present here, is that some of the news vendors there involved received small amounts from the publishers for redistributing the papers to other news vendors.

The established facts and the publishers' contentions in the *Hearst Publications* case are essentially the same as they are herein. We maintain that the reasoning and the result reached in *Labor Board v. Hearst Publications*, supra, are most persuasive, if

⁴This exhibit is printed in the appendix to the taxpayers' brief (pp. 8-35).

not controlling, authority sustaining the decision below.

Recent cases indicate the scope of the employment relationship contemplated by the Social Security Act under the controlling Supreme Court decisions. In *Schwing v. United States*, supra, there were involved journeymen tailors doing tailoring work for the taxpayers, retail clothing merchants, in making parts of suits at their own homes or shops. Each tailor did his work at his own home or shop free from supervision or control, furnished his own equipment, paid his own expenses, was paid on a piece-work basis, and had no guaranteed minimum weekly wage or guaranteed amount of work. The tailors were permitted to work for others and some did. In a cogent opinion realistically analyzing the facts, expressly looking to the "economic reality" of the situation, and considering all of the factors involved in the *Silk* case, the Circuit Court of Appeals reversed the District Court and concluded that the tailors were employees within the taxing provisions of the Social Security Act.

In *Fahs v. Tree-Gold Cooperative Growers of Florida, Inc.*, supra, the taxpayers were engaged in the business of producing and marketing citrus fruits. They contracted with certain individuals to assemble the fruit boxes, to secure the boxes when filled, to label and to load them, at a specified price per box. The persons so engaged, hired, discharged and paid the workmen to perform the necessary work. The equipment and materials were furnished by the taxpayers and the work was done on their premises. The tax-

payers exercised little or no direct detailed control over the work done by the persons engaged by the contractors, except to insist that the work keep pace with the requirements of the fruit being packed by the company. The Court concluded that all of the persons engaged in that work were the taxpayers' employees, saying that:

From the facts disclosed in the record, we are of opinion that the services in question constituted a part of an integrated economic unit devoted to the packing of citrus fruit and fruit products. The work was simple, requiring no skill or experience, and was of relative permanence. None of the contractors had any investment in facilities, since the substantial tools and premises were furnished by the taxpayer. The degree of control exercised by the taxpayer was substantially the same as would be expected if the contractors had been admitted employees, paid by the piece. Piecework in itself makes pointless much of the control which normally would be exercised over employees paid by the hour. It is significant, however, that where the interests of the taxpayer were involved, the findings disclose that control was exercised. However the facts are weighed, they will not support a conclusion that the persons in question were not, as a matter of economic reality, dependent upon the taxpayer's business as their means of livelihood. Since the facts in the instant case and in the case of *Rutherford v. McComb* do not appear to be distinguishable in any material degree, we think a corresponding result should be reached.

In *Henry Broderick, Inc. v. Squire*, *supra*, this Court held that certain real estate brokers with whom

the taxpayer, also a real estate broker, contracted were independent contractors. But the contrast between the facts with respect to the brokers there involved and the news vendors makes it manifest that a contrasting conclusion is required. To illustrate: the brokers, unlike the news vendors, were licensed by the state to carry and were carrying on the same type of business as the taxpayer there involved, dividing the commissions on sales made by the brokers. The brokers agreed to retain their licenses and pay all fees arising out of their activities as a broker. The news vendors here involved have no such independent business or occupation. The taxpayer there involved agreed to furnish the brokers with desk, telephone and switchboard service; the publishers furnish no services to the news vendors. The brokers were not required to keep regular hours and were free to come and go and to give as little or much time to the taxpayer's business as they pleased; the news vendors were required to sell their papers throughout the entire sales period. (R. 53, 404.) The brokers did their work where they pleased and in the manner they pleased. The news vendors were controlled in the general conditions of their work, and the nature of the services was such as not to permit or require the exercise of any similar discretion. The brokers bore all their own expenses such as transportation and entertainment costs in seeing prospects, automobile insurance, repairs, oil, gasoline and license fees; the news vendors have no expenses. The brokers had an investment in their brokerage licenses; the news vendors have no investment. The brokers had oppor-

tunities for profit and loss which depend entirely upon their initiative and skill. The news vendors have no such opportunities for profit, a guarantee against loss, and little or no occasion to display initiative or skill.

Particularly pertinent are two recent decisions involving the status of outdoor salesmen under the Social Security Act. In *Atlantic Coast Life Ins. Co. v. United States*, supra, the question was whether the agents of the taxpayer engaged in selling life insurance, collecting the premiums and related activities for the taxpayer insurance company, were employees or independent contractors. The agents were allotted a particular territory, and their compensation in the form of commissions was deducted from the premiums collected by them, the balance being remitted by the agents to the taxpayer, together with a weekly report as to their collections, new business, lapsed and reinstated business. By the terms of the contract between the taxpayer and the agent, the agent was engaged in an independent profession. While the taxpayer's assistant managers had a certain amount of control and supervision over the agents, as a practical matter it was not exercised. The agent was free to fix his own working hours, and usually worked only three or four days a week. The agents were not required to report to the taxpayer's offices or to attend sales meetings. Those agents in rural areas using automobiles had to bear the attendant expenses. The District Court, following the *Silk* case, concluded that the agents were employees within the taxing provisions of the Social Security Act.

Similarly, in *Tapager v. Birmingham*, supra, the question involved was the status of the outdoor salesmen engaged by the taxpayer to sell household furnishings from door to door and make collections. The salesmen operated on a commission basis. Some of them deducted their commission from the purchase price or the collections made and remitted the balance to the taxpayer. The salesmen were free from detailed control, had no allotted territory, bore their own expense of operating an automobile if one was used, were required to report on their activities only once a week, and carried on their selling activities when they saw fit. The Court, likewise applying the *Silk* case, concluded that the salesmen were employees within the Social Security Act. See also *Your Ice Co. v. United States*, 57 F. Supp. 830 (M.D. Tenn.); *Stone v. United States*, 55 F. Supp. 230 (E.D. Pa.); *Johnson v. Altmeyer*, 63 F. Supp. 796 (W.D. Ky.).

A number of the state courts have considered the question of the status of news vendors under state laws. These decisions do not all reach the same conclusion, nor can they all be reconciled. Suffice it to say, there are a number of such decisions in accord with the *Hearst Publications* case, holding news vendors to be employees rather than independent contractors under circumstances similar to those herein, if not more favorable for the publishers' position. Among those cases, some of which were decided on the common law test, are: *Salt Lake Tribune Pub. Co. v. Industrial Comm.*, 99 Utah 259, 102 P. 2d 307; *Pacific Emp. Ins. Co. v. Indus. Acc. Com.*, 3 Cal. 2d 759, 47 P. 2d 270; *Matter of Scatola*, 282 N. Y. 689, 26 N. E.

2d 815; *Wilson v. Times Printing Co.*, 158 Wash. 95, 290 Pac. 691; *Hampton v. Macon News Printing Co.*, 64 Ga. App. 150, 12 S. E. 2d 425; *California Employment Com. v. Bates*, 24 Cal. 2d 432, 150 P. 2d 192; *Journal Pub. Co. v. State Unemployment Comp. Com'n*, 175 Ore. 627, 155 P. 2d 570; *In re Whiteher*, 263 App. Div. 906, 32 N. Y. S. 2d 32; *In re Wieder*, 266 App. Div. 933, 43 N. Y. S. 2d 873, affirmed with memorandum opinion, 292 N. Y. 609, 55 N. E. 2d 375; *Cal. Emp. Com. v. L. A. Down Town Shopping News Corp.*, 24 Cal. App. 2d 421, 150 P. 2d 186.

In *Salt Lake Tribune Pub. Co. v. Industrial Comm.*, supra, the contract between the publisher and the newspaper distributor and vendor was in terms a purchase and sale agreement with the express provision that the publisher (p. 260) "has no right of control, supervision or direction over said Circulator, or the means or method by which he may sell or distribute said newspapers and/or publications." In *Journal Pub. Co. v. State Unemployment Comp. Com'n*, supra, and *Hampton v. Macon News Printing Co.*, supra, the agreement between the newspaper publisher and the newspaper distributor or vendor was in terms a vendor-vendee agreement.

There are numerous other state court cases holding persons engaged in the sale of other commodities to be employees, where the vendor had as much or more latitude and discretion in the sale of the product in question than the news vendors involved herein. Such persons were usually outdoor or travelling salesmen, who, unlike news vendors, are not susceptible to con-

trol. Illustrative cases are set forth below.⁵ In those marked with an asterisk, the vendor of the product in question was, by written agreement or otherwise, considered to be the purchaser of the product which he was selling for his employer.

The six Circuit Courts of Appeals cases relied on by the taxpayers are factually dissimilar, all were decided before the Silk decision, and four of them, at least, were decided on the common law test of the employment relationship.

⁵*Matter of Electrolux Corp.*, 288 N. Y. 440, 43 N. E. 2d 480 (vacuum cleaners); **Schomp v. Fuller Brush Co.*, 124 N.J.L. 487, 12 A. 2d 702, affirmed, 126 N.J.L. 368, 19 A. 2d 780 (brushes); **Creameries of America v. Ind. Comm.*, 98 Utah 571, 102 P. 2d 300 (dairy products); *In re Foy*, 10 Wash. 2d 317, 116 P. 2d 545 (cooking utensils); *Globe Grain & Milling Co. v. Ind. Comm.*, 98 Utah 36, 91 P. 2d 512, modified at rehearing, 98 Utah 48, 97 P. 2d 582 (sheep feed); **Sisk v. Arizona Ice & Cold Storage Co.*, 60 Ariz. 496, 141 P. 2d 395 (ice); *In re Castaldo*, 263 App. Div. 758, 30 N.Y.S. 2d 736; *Matter of Morton*, 284 N. Y. 167, 30 N.E. 2d 369 (undergarments); **Jack and Jill, Inc. v. Tone*, 126 Conn. 114, 9 A. 2d 497 (ice cream); *Singer Sew. Mach. Co. v. State U. C. C.*, 167 Ore. 142, 103 P. 2d 708, 116 P. 2d 744 (sewing machines); *Robert C. Buell & Co. v. Denaher*, 127 Conn. 606, 18 A. 2d 697 (securities); **Murphy v. Daumit*, 387 Ill. 406, 56 N.E. 2d 800 (vacuum cleaners); *Electrolux Corp. v. Board of Review*, 129 N.J.L. 154, 28 A. 2d 207; *Moorman Mfg. Co. v. Industrial Commission*, 241 Wis. 200, 5 N.W. 2d 743 (stock food); **Van Ogden, Inc. v. Murphy*, 390 Ill. 133, 60 N.E. 2d 877 (cosmetics and spices); *Leinbach Co. v. Unem. Comp. Board*, 146 Pa. Super. 237, 22 A. 2d 57 (clothing); *State v. Superior Court for Thurston County*, 22 Wash. 2d 811, 157 P. 2d 938 (oleomargarine).

II.

THE MATERIAL FACTORS APPLIED TO THE ESTABLISHED
FACTS COMPEL THE CONCLUSION THAT THE NEWS VEN-
DORS WERE EMPLOYEES.

We have stated above the non-inclusive list of factors, given in the *Silk* case, which should be considered in determining whether the employment relationship exists in any given case. Applying these factors and others to the established facts herein will, we believe, make it plain that most of these factors, if not all, tend to show that the news vendors were not independent contractors.

A. The control factor.

The Court below found as a fact that "The services performed by the news vendors were subject to a reasonable measure of general control by the publishers over the manner and means of their performance." (R. 71.) We shall endeavor to demonstrate that the correctness of this finding is well supported, if not established, by the findings and all the evidence. However, as pointed out above, this is only one of the factors to be considered, that it is the "total situation" that governs, and that the taxpayers are in error in asserting that this is the "most important" factor. (Br. 17.)

In the *Silk* case, the Court explicitly said that no one factor was controlling, and determined the coal unloaders involved to be employees although they were not subject to control. In the *Rutherford Food Corp.* case, hereinafter discussed, certain persons were determined to be the petitioners' employees, de-

spite the District Court's finding that the petitioners had never exercised any direction or control over them, which finding was not disturbed by either the Circuit Court of Appeals or the Supreme Court. In the *Bartels* case, the band leader was held to be the employer of members of the band, although it was provided by contract that the ballroom operator for whom the band was playing should (p. 128) "have complete control of the services which" the members of the band should render. And in *Matcovich v. Anglim*, 134 F. 2d 834, certiorari denied, 320 U. S. 744, this Court held that the taxidancers there involved were employees of the dance hall operator who engaged them despite the fact that there was no finding that the operator controlled the manner or method in which they danced.

Whatever discretion and latitude the vendors had in the performance of their service is of no legal significance. The Court below found that "The manner in which the news vendors individually could offer the newspapers for sales to the public was so limited and of such nature as not to need control." (R. 69.) The publishers' witnesses testified that there is only one manner in which newspapers can be sold and all that is required is "the ability to stand up and hand out papers in return for nickels." (R. 181, 407.) One news vendor testified that in his experience there had been no occasion for any orders or instructions. (R. 300.) The right to control and the exercise of control presupposes there is some choice or discretion in the method and means of performing the service involved and where it is absent the control factor can

have little or no significance. Newspaper vending is not a skilled occupation. Ten of the news vendors suffered from mental disability. (Ex. AJ.)

It is apparent that the publishers, like the publishers in the *Hearst Publications* case (p. 117-118) "in a variety of ways prescribe, if not the minutiae of daily activities, at least the broad terms and conditions of work." First, the news vendors were limited as to where they performed their service. They were engaged to sell newspapers at a particular sales location determined by the publishers. (R. 65.) Those locations were "designated, limited, changed, discontinued or reestablished entirely at the publishers' direction and in order to coincide with the changing public demand." (R. 67, Ex. 41, Sec. 13(d), Sec. 15.) The only apparent limitation on the publishers, unless the arbitration clause was applicable, was that "Any News Vendor assigned to a Full Time or Part Time Corner or Corners shall not be changed from one Corner to another for a period of at least one (1) week unless a change is made by mutual consent between the Union and the Publisher or Publishers concerned." (Ex. 41, Sec. 31(a), R. 67, 68.) Second, the union contract fixed the so-called retail price and the so-called wholesale price of the newspapers. (R. 68, Ex. 41, Secs. 8, 9). Thirdly, the publisher controls the amount of newspapers delivered to the news vendors for sale by him to the public. (R. 69.)⁶

⁶In *Labor Board v. Hearst Publications*, 322 U. S. 111, it was said (p. 117):

Not only is the "profit" per paper thus effectively fixed by the publisher, but substantial control of the newsboys' total "take home" can be effected through the ability to designate

Fourthly, even the actual sale of the newspapers is controlled in part by the union contract in that the vendors were required to sell "complete newspapers only with all sections thereof in such order" as designated by the publishers and "were not allowed to sell competitive newspapers without the publishers' consent." (R. 69, Ex. 41, Secs. 14, 21.)

A fifth element of control may be found in the union contract provision under which as the Court found (R. 68-69) "the publishers fixed for the various types of corners, the days and hours of sale which the publishers established to coincide with the news releases, the public's reading habits and its concentration at particular locations at particular periods." (Ex. 41, Secs. 26, 27.) A sixth control may be found in the union contract provision that all unsold newspapers "shall be returned to the Publisher's representative in accordance with the requirements of the Publisher." (Ex. 41, Sec. 19.) This provision not only insured the news vendor against any risk attendant upon failure to sell newspapers, but also represents the positive requirement as to the disposition of the papers which the news vendor allegedly purchased and owned.

Lastly, it must be recognized realistically that in the publishers' right to terminate the relationship for

their sales areas and the power to determine the number of papers allocated to each. While as a practical matter this power is not exercised fully, the newsboys' "right" to decide how many papers they will take is also not absolute. In practice, the Board found, they cannot determine the size of their established order without the cooperation of the district manager. And often the number of papers they must take is determined unilaterally by the district managers.

cause or their right to designate sales locations and transfer a vendor from one location to another, there was implicit considerable power of control. *United States v. Wholesale Oil Co.*, 154 F. 2d 745, 748-749 (C.C.A.10th).

It is no answer for the taxpayers to point out cases holding that the employment relationship did not exist in which one of the elements of control described above was present. It is the "total situation" that governs and it is difficult, if not impossible, to find a case in which all of the elements of control described above are present other than the *Hearst Publications* case.

Considering these controls, and the nature of the news vendors' services, it is not apparent what "independence" the alleged "independent contractor" news vendor had, what discretion and latitude he had, or in what significant respects he may be said to be free from control.

The taxpayers insist that the news vendors were free from control, except only as to the "results" to be accomplished, but do not state what those results are. The news vendors cannot be forced into the classical description of an independent contractor as one who is responsible to the person with whom he contracts as to "results only" and not as to the "means and methods" by which such results are obtained. The news vendor is not engaged to obtain any particular result but to perform a continuing service for the publisher, that is, to be available on the street corner so that the public may purchase the

publisher's newspapers. Compare *Brown v. Industrial Acc. Comm.*, 174 Cal. 457, 461, 163 Pac. 664.

The publishers apparently believe that it is significant that the news vendors were not required to report to the publishers' premises, when there was no occasion to report; that no meetings of any news vendors were ever held when there was no apparent occasion for any meeting; and that no reports were required of any news vendors, when, in fact, the wholesaler kept the records of the news vendors' sales. (R. 201, 295, 298, 300, 314, 428-431, 433-435, Ex. 46, K, X, Y, Z, AA, AB.) The fact that the news vendors' earnings depended on the amount of their sales obviated any instructions to increase sales. Anyone operating on a piece work or commission basis is moved by self-interest to increase his production of sales as in the case of persons held to be employees in the *Silk*, *Tree-Gold*, *Schwing*, *Tapager* and *Atlantic Coast Life Ins.* cases, discussed hereinbefore.

It may be true in the actual day-to-day relationship that the news vendors were free from detailed direct control by the publishers. But the excerpts⁷ from

⁷Exs. AD, AE:

December 15, 1943, "Drunk again on corner. I checked him in at 10:15 P.M. and sent him Home."; July 2, 1943, "Vendor was drunk and I checked him in on 1st Edition and sent him home. I covered corner with Boy."; April 16, 1943, "This vendor is doing a swell job on this corner * * * Please retain him."; April 7, 1943, "This vendor * * * was very unruly."; July 11, 1943, "This vendor is very poor one for this corner. He is away down from the regular sale * * *."; June 8, 1943, "Had to check above vendor in at 11:15 P.M. He refused to pay for his Holdouts. * * * He is very nasty and a poor Hustler."; June 2, 1943, "This vendor said he had to take his lunch hour from 1:00 to 2:00 AM or thereabouts on orders of his business agent. But we gave him his lunch hours as follows * * *."; May 2, 1943, "Vendor * * *

some of the "corner complaints" or the written reports of the wholesalers to the publishers on the misconduct of a vendor are illuminating as to who was "boss".

Even the common-law test of the employment relationship contemplated only "a reasonable measure of direction and control" which "need not relate to every detail" (*Jones v. Goodson*, 121 F. 2d 176, 180 (C.C.A. 10th)), but is to be determined by the nature of the work and the experience of the employee.⁸

too old for corner."; June 2, 1943, "Can't use for this corner. N.G. This vendor hollers Examiner and I'll be damned if I ever hear him holler S.F. Chroniele. He slips on our sale anywhere we put him."; June 2, 1943, "This vendor is a poor excuse as a vendor. He will not stay out until his designated hour. The corner above him * * * outsells him. * * * Kill the corner and send the vendor back to Daly City."; January 14, 1944, "* * * Drinks to much. I recommend he be moved off corner."; May 11, 1943, "Vendor did not go to work until 10:00 PM. Had to cover corner with a boy * * *"; May 28, 1943, "When I drove up with the last edition 11:45 P.M. he only had 5 Chronicles and I wanted to give 10 more copies. He refused to accept so I checked him in and send vendor home. The trouble was that he wanted to leave corner before regular time."; May 24, 1943, "So I said why he was so late and he said *so what* and got abusive so I checked him."; November 25, 1943, "* * * Woody—Please fire this man."; May 2, 1943, "Above vendor was discharged from Golden Gate & Fillmore on April 27/43 (see complaint of same date). Since that time he hasn't been hired by this office, yet he shows up at O'Farrell and Powell; has an argument with the wholesalers and to climax the whole set up fails to check in * * * Who is doing the hiring?"; June 17, 1943, "He has often expressed that he would push the Examiners if he saw fit to do so, and there was nothing I could do about it. I want him removed."; August 10, 1943, "Would not take enough papers to last till time to quit at 2:00. Check him in at 12:00."

⁸*Walling v. American Needlecrafts*, 139 F. 2d 16 (C.C.A. 6th); *Western Express Co. v. Smeltzer*, 88 F. 2d 94 (C.C.A. 6th); *Peasley v. Murphy*, 381 Ill. 187, 44 N.E. 2d 876; *Andrews v. Commodore Knitting Mills*, 257 App. Div. 515, 13 N.Y.S. 2d 577. "The nature of the employee's work may be such that much or little supervision may be necessary." *Fisher v. The Industrial Commission*, 301 Ill. 621, 629, 134 N.E. 114, 117. See also *Western Express Co. v. Smeltzer*, *supra*; *Franklin Coal Co. v. The Industrial Commission*, 296 Ill. 329, 129 N.E. 811; *Eagle v. Industrial Comm.* 221 Wis. 166, 266 N. W. 274.

The control factor here exercised must be resolved in favor of the employment relationship under any theory.

B. Opportunities for profit and loss.

It is plain that the application of this factor discredits the taxpayers' contention. There were no opportunities for profit or loss based upon any capital investment because the news vendor had no capital investment. Certainly there was no real opportunity for loss in any sense (a) because the news vendors received full credit for all unsold papers, and (b) because the vendors were insured even against the loss of income in the provision in the union's contract which provided for a guarantee of a weekly minimum remuneration designated as "minimum weekly profit".

The possibility of loss was with respect to papers lost, stolen, or destroyed, a fact also present in the *Hearst Publications* case, which is not significant. "Employees are frequently charged with the value of the employer's property entrusted to the employees' care, and later docked for an equal amount for negligent loss or misuse." See the dissenting opinion in *Hearst Publications v. National L. Relations Board*, 136 F. 2d 608, 615 (C.C.A. 9th). The record does not show the extent to which the news vendors give credit. But any such voluntary assumed risk in what is customarily a cash transaction could hardly be considered an opportunity for loss. It has been the practice in many restaurants and bars to require the waiters, who are indisputably employees, to pay for the food and drinks and to bear the loss for any failure to collect from the patron.

Whatever limited opportunities the news vendor had to increase his earnings does not differ from the increased earnings received by an employee working on a commission or piece-work basis for the increased sales or production, as illustrated in the federal cases cited above.

C. The investment factor.

The context of the *Silk* opinion indicates that the "investment in facilities" factor was significant in the conclusion reached with respect to the truckers and the unloaders involved in the *Silk* case.

The application of that factor in the cases at bar is free from doubt. The news vendor has no investment in facilities whatsoever. (R. 70-71.) The publishers have a very large investment and much of that investment, such as the high speed press, is designed to facilitate immediate distribution of the news and newspapers through the street news vendors, where saleability could be more easily accomplished by the recency of the news. Even the relatively minute investment in the display stands for the newspapers used by the news vendors was made by the publishers. (R. 70.)

D. Permanency of relationship.

There was a permanency of relationship. The publishers' contract with the news vendor was a continuing one for an indefinite period and, unlike the relationship between independent contractors, did not expire at the end of any particular job or result. Moreover, an estimate of the average duration of the relationship may be gained from the fact that on March

16, 1945, the news vendors' union organized in 1937 had approximately 377 members, 222 of whom were charter members. (Ex. AJ, R. 236.)

E. Skill required.

Certainly the publishers would not contend that any particular skill was involved in the street sale of newspapers and certainly no managerial skill involving any business judgment or decisions was required. The opinion of the Court below, the findings, and the undisputed evidence pointed out in the discussion on the control factor leave no doubt that the taxpayers cannot rely on this factor. (R. 69, 71, 181, 300, 407.)

F. The integration factor.

The taxpayers complain (Br. 7) that the Court below erred "In finding that the retail sale of newspapers was an integral part of the publisher's business, and in failing to find that the retail sale of newspapers by persons independent of the publisher was common practice and not unrealistic." The actual finding to which the taxpayers apparently object and which is quite different is this (R. 70):

The news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publishers.

This finding does not control the correctness of the conclusion reached. But, we submit, that finding is manifestly sound, and is supported by more than substantial evidence. It is a material consideration demonstrating the employment nature of the relationship with the news vendors. The significance of the

integration factor is found in the *Rutherford Food Corp.* case involving the question of whether certain meat boners were employees of the petitioners within the Fair Labor Standards Act.⁹ The petitioners there involved operating slaughter houses, were engaged in the business of processing meat for the production of boned beef. During the period in question one of the petitioners entered into a written contract with an experienced boner, which provided that he would assemble a group of skilled boners to do the boning at the slaughter house, for which he should be paid a specified amount per hundred weight of boned beef; that he would engage, pay and have complete control over the other boners who would be his employees; and petitioners would be furnished a room in its plant for the work. The contract was subsequently modified in only one essential respect by providing for the payment of a certain amount of the rent for the use of the boning room, although no rent was ever paid. The money paid by the petitioners for the boning was shared equally by all the boners except for a brief time when some of the boners were paid by the hour by the person contracting with the petitioners. The boners furnished their own tools, consisting of a hook, a knife, a knife sharpener, and a leather apron. In reaching the conclusion that these boners were employees of the petitioners, the Court manifestly gave

⁹In considering that question, the Court recognized that (p. 727) "Decisions that define the coverage of the employer-employee relationship under the Labor and Social Security Acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act." The converse application of the Fair Labor Standards Act decisions to the question of the employment relationship under the Social Security Act is found in the *Tree-Gold* case, *supra*.

particular weight to the fact that the boning was one of a series of steps in the petitioners' operation, occurring between the time the slaughtered cattle were dressed and the time the boned meat was trimmed for waste by an employee of the petitioners. The Court also noted that petitioners never attempted to control the hours of the boners except that they were required to keep the work current and the hours they worked depended in a large measure upon the number of cattle slaughtered. The Supreme Court approved the characterization of the Circuit Court of Appeals in that case that the boners were part of the integrated unit of producing boned beef. It is to be particularly noted that the boners were not engaged by the petitioners, their compensation was not received directly from the petitioners, nor was it controlled by them, since each boner shared equally with every other boner.

The reasoning of the *Rutherford Food Corp.* case was applied in the *Tree-Gold* case under parallel facts reaching the same conclusion. See also *Tapager v. Birmingham*, *supra*.

Applying the integration factor to the situation before the Court, it is evident that the services of the street news vendors are an integral part of the taxpayers' business and not an independent calling. The taxpayers are engaged in a large independent business enterprise whose end product is the distribution of news to the public. It encompasses a large capital investment. It depends for its existence upon the sale of the newspapers to the public, not only because of the amount received for the papers sold, but, more

importantly, because paid circulation vitally affects its revenues from advertising. (R. 162-163, 393.) The sale of a newspaper to a wholesale distributor would have little business significance to the taxpayers, and so-called sales to a news vendor would be meaningless from any viewpoint considering the vendor's privilege of returning all unsold newspapers. As a publisher's witness testified: Circulation "is the life blood of a newspaper." (R. 162.) See *Journal Pub. Co. v. State Unemployment Comp. Com'n*, supra.

The publisher obtains the distribution of newspapers to the public in several ways, such as mail subscription, dealers and carriers, counter sales and street vendors. (Exs. P-W.) The Court below made no determination of the relationship between the publishers and those distributing newspapers to the public through any channel except street vendors. The integration factor is peculiarly applicable to sales through street vendors for at least two reasons. First, the sales through street vendors comprise a very substantial portion of all the sales. In the case of the Examiner, the sales through street vendors averaged thirty-seven per cent of city circulation and seventeen per cent of the total circulation during the period in question. (Exs. P-S.) Secondly, the distribution through street sales must necessarily be closely integrated into the publishers' operation because of the very nature of street sales which is so well described in the taxpayers' closing trial brief (p. 6):

It is pertinent to see what some of the peculiarities of the newspaper business are. Newspapers are extremely perishable, are sold, so far as this discussion is concerned, only on the pub-

lic streets and for a very low price. Time is of the essence to the business. The publisher has no control over when news is going to break. When it does, he must get it into the hands of the public in the shortest possible time—otherwise it ceases to be news. For this reason, there are usually a number of issues a day, both of the morning and evening papers. Each issue as it comes out supersedes its predecessor, and the predecessor thereupon becomes obsolete and of little, if any, value. All of this means that the retailing of newspapers must be conducted as [sic] specified times and places so that distribution may be rapid and the papers made available to the public as soon as possible after they come off of the press. It follows that the contracts, and all the provisions thereof, have been drawn to accomplish this objective.

To accomplish this “objective” it was necessary for the taxpayers to obtain the services of news vendors to sell the newspapers to the public while the news was still saleable. The terms of the union contracts and their daily operating practice represent the resultant integration of the services of the news vendors into the publishers’ business. The street sales of newspapers through the news vendors is just as closely integrated into the taxpayers’ business as are the street sales accomplished through their unattended street news racks which are also supplied with newspapers by the wholesalers who are indisputably the taxpayers’ employees. (R. 395-399, 432.)

Conversely, it cannot be said that the news vendor has an independent calling or business of his own which he integrates with the publishers’ business.

There is nothing in the inherent nature of selling newspapers on the corner which would indicate it to be an independent business or calling. The news vendor does not hold himself out to the public as doing business in his own name or being engaged in business for himself. The news vendors who have no investment, expenses, advertising, payroll, permanency of work location, books or records, and who are set up in their so-called business by the publisher by the simple expedient of putting newspapers in their hands, and who can be put out of business with almost the same ease, can hardly be put in the ordinary concept of the retail merchant, even in the most specialized and humble business. (R. 314-315.) The only name associated with the sale of newspapers is the name of the newspaper being sold, which appears on the newspapers and the publishers' rack which holds the papers.

The fact, as well as the appearance, is that the news vendors are engaged, not in their own business, but in the business of the publishers. The news vendors are not in a position of an independent merchant who purchases goods from whom he pleases, under such terms and conditions he chooses and disposes of his services or products at such time and place as he chooses. When the news vendors here lose their connection with the publishers, they cut off their entire income.

There is no better indication of the extent of the integration, and of whose business the news vendors are engaged in than the fact that the publishers find it necessary to engage news vendors to sell at corners or sales locations where they know in advance it will

be necessary to pay the vendor something to permit him to earn the minimum guaranteed by the contract. (R. 134-135, 159-160, 163, 349-350.)

The fact that the news vendor might undertake to obtain substitutes or relief men during meals and for other reasons does not make them any the more independent contractors, and the extent of the practice has not been shown. That fact did not affect the status of the news vendors doing the same thing in *Labor Board v. Hearst Publications*, 322 U. S. 111, 119, fn. 17. In the *Rutherford Food Corp., Tree-Gold*, and *Wholesale Oil Co.* cases, *supra*, the persons determined to be employees engaged others to assist in the work.

The fact that a maximum of thirty-five vendors had large magazine stands cannot affect this Court's decision on the status of 650 to 750 vendors, most of whom sold newspapers exclusively. (R. 29, 227-230.) The relationship of the vendors selling articles other than newspapers was not different from those selling newspapers exclusively. (R. 47.) The relationship between the vendors and the persons from whom or for whom they were selling such other articles has not been shown, and was not part of an independently established business. (R. 70-71.) In any event, that relationship does not affect the news vendors' relationship with the publishers. Compare *Western Union Tel. Co. v. McComb*, 165 F. 2d 65, 71 (C.C.A. 6th). The news vendors in the *Hearst Publications* case, *supra*, p. 119, fn. 17, sold newspapers, periodicals and other items not furnished them by the publishers. See also *Sisk v. Arizona Ice & Cold Storage Co.*, *supra*.

G. The right to terminate the relationship.

One of the most universally accepted indicia of the employment relationship is the right of one of the parties to terminate the relationship at any time or on short notice. *Los Angeles Athletic Club v. United States*, 54 F. Supp. 702 (S.D. Cal.), appeal dismissed, 144 F. 2d 352 (C.C.A. 9th). That right is present in the union contract provision that "Each publisher may discontinue sales to any News Vendor." (Ex. 41, Sec. 15.) Any right which the vendor may have had to contest the discharge for lack of cause by submitting it to arbitration does not derogate from the fact that this right to terminate existed. The protection against arbitrary discharge is not uncommon in union contracts.

H. The guaranteed earnings.

One of the most illuminating provisions of the union contract on the nature of the relationship created is the guarantee of a weekly minimum remuneration designated as "minimum weekly profit". This fact puts the news vendors in the category of employees performing personal services on a piece-work or commission basis with a minimum wage guarantee. In subsequent contracts there was even a provision for the payment of a bonus. (Ex. 43, Sec. 16(a).)

I. The parties to the contract.

Considering the nature of the contract governing the relationship between the taxpayers and the news vendors, and the character of the motive of the parties in entering into it, the only reasonable construction

of the relationship is that of employer and employee. The taxpayers are publishers who are engaged in an independent business enterprise of the production and distribution of newspapers to the public. The news vendors' union is a labor union, in other words, an organization composed of persons who perform "labor" for others. On three occasions during the taxable period, the union membership voted to go on strike against the publishers. (R. 266-267.) The union is not in a retail business men's association or any organization of independent business men such as the San Francisco Newspaper Publishers Association. Its affiliations are solely with other labor unions and labor organizations, and not with any business men's organizations. (R. 236-239, 249, Exs. B, C, D.) The union contract here involved is a normal collective bargaining agreement between an employer and the union acting as the sole bargaining agent for a group of employees. The Supreme Court in *Labor Board v. Hearst Publications*, supra, indicated that the very economic conditions giving rise to such labor unions and collective bargaining agreements show that the union members are to be treated as employees in the application of legislation affecting their economic rights and conditions. To hold that this labor union represents a number of independent contractors and business men strains credulity. Of course, there is no similarity between the work of the news vendors and the work of artists, engineers and architects organized in "unions".

J. The news vendor was not a purchaser of the newspaper.

Even if the taxpayers were correct in their assumption that the news vendors were the purchasers and owners of the newspapers acquired from taxpayers, that would not affect the result. We have cited above a number of cases in which persons have been held to be employees of the person whose product they were selling, even though the vendor was, by written agreement or otherwise, considered to be the purchaser of the product which he was selling, as in *Salt Lake Tribune Pub. Co. v. Industrial Comm.*, supra; *Journal Pub. Co. v. State Unemployment Comp. Com'n*, supra; *Hampton v. Macon News Printing Co.*, supra, and others. The news vendors in the *Hearst Publications* case acquired their newspapers under the same conditions as the vendors here involved, and the Court apparently assumed that the vendor was the purchaser.

However, there is considerable doubt whether it can be said that the news vendors here involved were the purchasers and owners of the taxpayers' newspapers. No such determination was made by the Court below and the undisputed facts indicate a diametrically opposed conclusion. The written contract between the individual news vendor and publisher does not provide for the purchase of the newspapers by the vendor, but that the vendor agreed to "sell" the publisher's newspaper at a location designated by the publisher. The union contract expressly provides that it governs "the sale of newspapers of the Publishers by News Vendors." (Ex. 41, Sec. 2.) The complaints

admit that the news vendors are responsible to the publishers for the results accomplished in the "retail sale" of the newspapers to the public. (R. 8.) Thus, it is evident that the controlling contracts between the publishers and the news vendors were not for the sale by the publishers to and the purchase by the news vendors but a contract governing the services performed by the news vendor in selling the newspapers to the public. It was the obvious purpose to provide for the effective and ultimate sale of the publishers' newspapers by the news vendors to the public, which is the publishers' business.

The news vendor is not in any sense an independent buyer of the newspapers, free to do with them as he sees fit. The terms and conditions under which he possesses the newspapers are inconsistent with the conclusion that he is the purchaser or the owner of the newspapers. The union contract governs where, when, the condition and the price at which he sells the newspapers. He pays nothing for the papers when received, and is responsible only for the so-called "wholesale" price at the end of the day's sales period when he is required to account for all papers sold, or which have been destroyed or lost. The union contract even provides that "All unsold complete newspapers shall be returned to the Publisher's representative in accordance with the requirements of the Publisher." (Ex. 41, Sec. 19.) Thus, the news vendor is not even free to retain the newspapers he allegedly purchased even at the expense of paying the "wholesale" price.

The statement in the union contract that it was the intention of the parties to maintain the relationship of buyer and seller was inserted in the contract not because of any mutual belief to that effect but because of the insistence of the publishers, the vendors agreeing because their primary concern was their economic betterment and not the name that the publishers wished to give to the relationship. (R. 67, 151, 242-243, Exs. A, J, 44.)

The wishes of the parties and the name given to the relationship by the contract cannot control the liability for taxes. *Bartels v. Birmingham*, *supra*; *Rutherford Food Corp. v. McComb*, *supra*; *Matcovich v. Anglim*, *supra*. This Court has said that "legal relationships are determined not by labels but by contractual provisions, interpreted according to law." *Childers v. Commissioner*, 80 F. 2d 27, 31. See also *Watson v. Commissioner*, 62 F. 2d 35, 36 (C.C.A. 9th). In a number of the salesmen cases, cited above, it was held that the relationship was that of employer and employee when the written agreement between the parties designated the employee to be a lessee, licensee, buyer, partner or independent contractor. The contract between the news vendors and the publishers must be adjudicated by what was done, and not by what might have been intended to be done. *Davidson v. Commissioner*, 305 U. S. 44, 46. Their intention might be binding as between them "but not as against the Treasury." *Glenmore Securities Corp. v. Commissioner*, 62 F. 2d 780, 781 (C.C.A. 2d), certiorari denied, 289 U. S. 754.

III.

THE NEWS VENDORS ARE EMPLOYEES AS A MATTER OF
"ECONOMIC REALITY".

The characterization of employees under the Social Security Act in the *Bartels* case as (p. 130) "those who as a matter of economic reality are dependent upon the business to which they render service" covers the news vendors. They devote their full services to the publishers, selling newspapers exclusively in most instances. They have no investment, no business identity or good will; they acquire no capital and are dependent upon the publishers' business for their livelihood. When their relationship with the publishers is terminated, they lose their source of income, in short, they "are out of a job" like any employee.

For the same reasons, it is apparent that the news vendors here involved come within the remedial purpose of the statute. Any doubt about their status should be resolved by the determination which affords them the benefits of the Social Security Act, as well as subjecting their wages to the taxes imposed by the Act. In essence, the news vendors constitute an occupational group, performing unskilled services, and entering into collective bargaining with persons for whom they perform their services to obtain economic benefits. They constitute a class of workers especially vulnerable to the hazards of unemployment, as evidenced by their advanced average age, their disabilities, and the fact that their earnings are in the lowest bracket. The weekly guarantee in the

third union contract in 1940 for forty-six hours of service was \$19 per week. (Ex. 41, Sec. 16.) The insecurity of the news vendors and the need to classify them as employees is implicit within some of the very reasons given by the union why they should be exempted from the taxes. (Ex. AJ, Amicus Br. 5.) The union urges as a reason for exemption that the publishers would no longer be willing to engage them to sell the newspapers if they were held to be employees, because the publishers would be reluctant to assume the responsibility of employers for such items as workmen's compensation insurance which, in the case of news vendors having disabilities, might be high.

To exempt the news vendors here involved from the taxes and benefits under the Social Security Act would be to defeat its purpose and application to an occupational group clearly intended to be included within the scope of the Act.

CONCLUSION.

We respectfully submit that the decision of the court below is correct and should be affirmed.

Dated, April 12, 1948.

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(Appendix Follows.)

Appendix.

Appendix

Social Security Act, c. 531, 49 Stat. 620:

Section 801. * * * there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

* * * * *

(42 U.S.C. 1940 ed., Sec. 1001.)

Sec. 804. * * * every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

* * * * *

(42 U.S.C. 1940 ed., Sec. 1004.)

Sec. 811. When used in this title—

* * * * *

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, * * *

* * * * *

(42 U.S.C. 1940 ed., Sec. 1011.)

Section 901. * * * every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) pay-

able by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

* * * * *

(42 U.S.C. 1940 ed., Sec. 1101.)

Sec. 907. When used in this title—

* * * * *

(c) The term “employment” means any service, of whatever nature, performed within the United States by an employee for his employer, * * *

* * * * *

(42 U.S.C. 1940 ed., Sec. 1107.)

Substantially the same language quoted in the above sections may be found in Sections 1400, 1410, 1426(b), 1600 and 1607(c) of the Internal Revenue Code (26 U.S.C. 1940 ed., Secs. 1400, 1410, 1426, 1600 and 1607).

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

ART. 205. *Employed individuals.*— * * *

The words “employ,” “employer,” and “employee,” as used in this article, are to be taken in their ordinary meaning. * * *

Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the de-

tails and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent

trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

* * * * *

Substantially the same language quoted above may be found in Article 3 of Treasury Regulations 91, promulgated under Title VIII of the Social Security Act; section 402.204 of Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act; and Section 403.204 of Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED,
(a corporation),

Appellant,

No. 11,781

vs.

No. 11,782

UNITED STATES OF AMERICA,

Appellee.

THE CHRONICLE PUBLISHING COMPANY
(a corporation),

Appellant,

No. 11,783

vs.

No. 11,784

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF
NEWSPAPER & PERIODICAL VENDORS & DISTRIBUTORS
UNION, LOCAL NO. 468, OF
INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS
UNION OF NORTH AMERICA,
AS AMICUS CURIAE, IN SUPPORT OF APPELLANTS.

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cal No. 468, Amicus Curiae in Sup-
port of Appellants.*

FILE

MAR - 9 1940

PAUL P. O'BRIEN,

Subject Index

	Page
Introduction	1
Classification of the vendors as employees threatens to deprive them of substantial gains which they have achieved as independent contractors	2
The Social Security Act should not be construed to apply to the vendors	6

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED, (a corporation), vs.	<i>Appellant,</i>	No. 11,781 No. 11,782
UNITED STATES OF AMERICA,	<i>Appellee.</i>	
THE CHRONICLE PUBLISHING COMPANY (a corporation), vs.	<i>Appellant,</i>	No. 11,783 No. 11,784
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

BRIEF OF
NEWSPAPER & PERIODICAL VENDORS & DISTRIBUTORS
UNION, LOCAL NO. 468, OF
INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS
UNION OF NORTH AMERICA,
AS AMICUS CURIAE, IN SUPPORT OF APPELLANTS.

INTRODUCTION.

Leave having been granted by this Court, Newspaper & Periodical Vendors & Distributors Union, Local No. 468, a local union under the International Printing Pressmen & Assistants Union of North

America, respectfully submits this brief in support of the appeals of the Appellants. The relevant evidence and the legal effect thereof are set forth in the brief of the Appellants, and the Union will not duplicate that discussion. By means of this brief the Union will attempt to emphasize its contention that the relationship of the members of the Union to the Publishers, as established by the contracts of the parties, should be upheld by the Court and adjudged to be what it was intended and written to be by the parties, to-wit that of buyers and sellers,—an independent contractor relationship.

**CLASSIFICATION OF THE VENDORS AS EMPLOYEES
THREATENS TO DEPRIVE THEM OF SUBSTANTIAL
GAINS WHICH THEY HAVE ACHIEVED AS
INDEPENDENT CONTRACTORS.**

The evidence and the findings as set forth in the brief of Appellants show that throughout the period of five successive contracts between the Union and the Publishers, commencing in 1937, the parties have dealt on the basis that the relationship between the members of the Union and the Publishers is that of buyers and sellers. In other words, as between the parties themselves, the status of the vendors had become firmly settled through negotiations and contracts, as had other matters which the parties had embodied in their contracts, upon the basis that the contracts provided for the vendors being independent contractors. Operating under such contracts the vendors have been free from the directions of the Publishers, many of them have dealt in other wares.

and other publications while also selling those of the Publishers, and have established sound businesses and good incomes through the use of their initiative. Their only contact with the Publishers has been through the latter's wholesaler, and the wholesaler's sole province is to sell newspapers to the vendors and to collect the sales price.

The effort of the government to negative a basic provision of the contract between the Publishers and the vendors has created a serious practical problem for the vendors. A final decision in this case denying recognition of the status of the vendors as buyers and independent contractors, is quite likely to result in a new appraisal of their status by the Publishers, by other federal and state agencies, and by other persons, with respect to many of the rights and claims which the vendors have established or asserted.

It is a matter of common knowledge and is also shown by the evidence which was presented, that a great many of the vendors are aged and handicapped persons. The evidence also showed that the first buyer-seller contract procured by the vendors contained a provision for guaranteed minimum profits to each vendor of \$15 per week; that succeeding contracts raised the guaranteed minimum to \$37.50 per week and that the great majority of the vendors actually earned profits in excess of the guaranteed minimum, some between \$75 and \$100 per week. It is the judgment of the vendors, based upon their long experience, that if they are classified as employees they will be unable to maintain the economic gains

which have followed from their recognition as independent contractors, or to attain additional objectives which they are seeking. The weapon of a strike, which is the ultimate means by which employees attempt to attain their ends, has not been used by the vendors and in a realistic sense never was and is not now physically available to such a handicapped group of persons. They have utilized, and from practical necessity must continue to utilize, the procedure of arbitration and other legal procedures as the means by which they seek to maintain and better their incomes. Their rights to vend other publications and additional wares, to retain the full difference between the wholesale and retail prices of newspapers, to remain at a particular business location without being subject to change at the hands of the Publishers, and many other rights, are certain to receive different and less favorable consideration, both in negotiations with the Publishers and before arbitrators, in the event that the vendors are viewed as employees rather than as buyers and independent contractors. And it is extremely unrealistic for the government to urge, as it does, that a decision that the vendors are employees within the purview of social security legislation does not infringe upon their right to contract as independent contractors for other purposes. A decision in this case that the vendors are employees is very likely to be followed by attempted changes in the rights of the vendors all along the line, because many of the rights and benefits of the vendors are based upon their present recognized status as buyers and independent contractors.

Thus, it can be seen that the vendors base their opposition to the government's attempt to interfere with their contractual status as independent contractors on what the vendors earnestly believe to be best for their self-interest. The rulings of the Bureau of Internal Revenue and of the Trial Court, if permitted to stand, constitute an ever-present threat to the present and real security which the men now enjoy: The arrangements and incomes which they have attained through their contracts are such that the accrual of a surplus of employees in the labor market may result in competition for locations and cancellation of some contracts, particularly the contracts of the most physically handicapped vendors, if vendors are held to be subject to the burdens and restrictive rights of an employer-employee relationship with the Publishers. At the very least only the very best of the men would be retained, some corners where they do business would be consolidated, other corners eliminated, and, as to the men who are retained, set wages might well be substituted for the more lucrative profits that they now earn, particularly with respect to the heavily sold Sunday editions of the newspapers. In the judgment of the men themselves, other disadvantageous changes in their present set-up would be likely to follow.

The problem of the vendors is not a theoretical one, and is not materially solved by the limited aid provided by the Social Security Laws. It is a problem of maintaining a present, daily security, and is approached by the vendors in a practical and realistic manner, based upon long experience and giving care-

ful consideration to the relative advantages and disadvantages of a rule that would change their present status as independent contractors to that of employees. Their experience has traversed the terms of five successive contracts predicated upon a buyer-seller relationship. It has taught them that as independent contractors they are certain to continue to fare better and to improve their incomes and security, and that it is necessary that they exert every effort to prevent the present attempt to change their status to that of employees.

**THE SOCIAL SECURITY ACT SHOULD NOT BE
CONSTRUED TO APPLY TO THE VENDORS.**

The vendors realize that in the final analysis the question at bar turns upon the scope of the language used by the Congress in enacting the statute. But viewed from that standpoint, it is clear that the Congress did not frame the law so as to bar deliberately worked out relationships in which both parties have made it an essential point of their contract that their relationship shall be that of buyer and seller and an independent contractor relationship. The regulations, the administrative rulings, and the decisions applying the statute, as set forth in the brief of Appellants, all join in showing that Congress did not attempt to rewrite or refuse to recognize an independent contractor relationship which is created by all of the parties to a contract. Therefore, since the parties to the present contracts intended and in good faith bargained to create a relationship which is outside of the

scope of the statute, that intent and the provisions of the contracts should be given effect in the face of the attempt of the government to have the relationship construed otherwise than as the parties intended and wrote it. Small though he may be as compared with most legally recognized independent contractors, a vendor should not be denied the opportunities and self-respect which attend independent operators. In making their contracts, the Union on behalf of its members on one side, and the Appellants on the other side, evaluated the advantages and disadvantages of the relationship of independent contractors as compared with that of employees and took into consideration the relative value of social security, workmen's compensation and other incidents of employment. Since the evidence shows such process of evaluation throughout the terms of five successive contracts and a careful regard by the members of the Union for their own self-interest, and since it should be assumed that they are well advised by experience as to whether their self-interest is best promoted by maintaining their independent contractor status, such conclusions should be respected where, as here, the statute does not compel a contrary conclusion.

Dated, San Francisco,
March 1, 1948.

Respectfully submitted,

S. A. LADAR,

*Attorney for Newspaper & Periodical
Vendors & Distributors Union, Local No. 468, Amicus Curiae in Support of Appellants.*

IN THE
United States Circuit Court of Appeals
 For the Ninth Circuit

FILED

MAR 15 1948

HEARST PUBLICATIONS, INCORPORATED,
 a corporation, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

THE CHRONICLE PUBLISHING COMPANY,
 a corporation, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

PAUL P. O'BRIEN, CLERK

No. 11,781

No. 11,782

No. 11,783

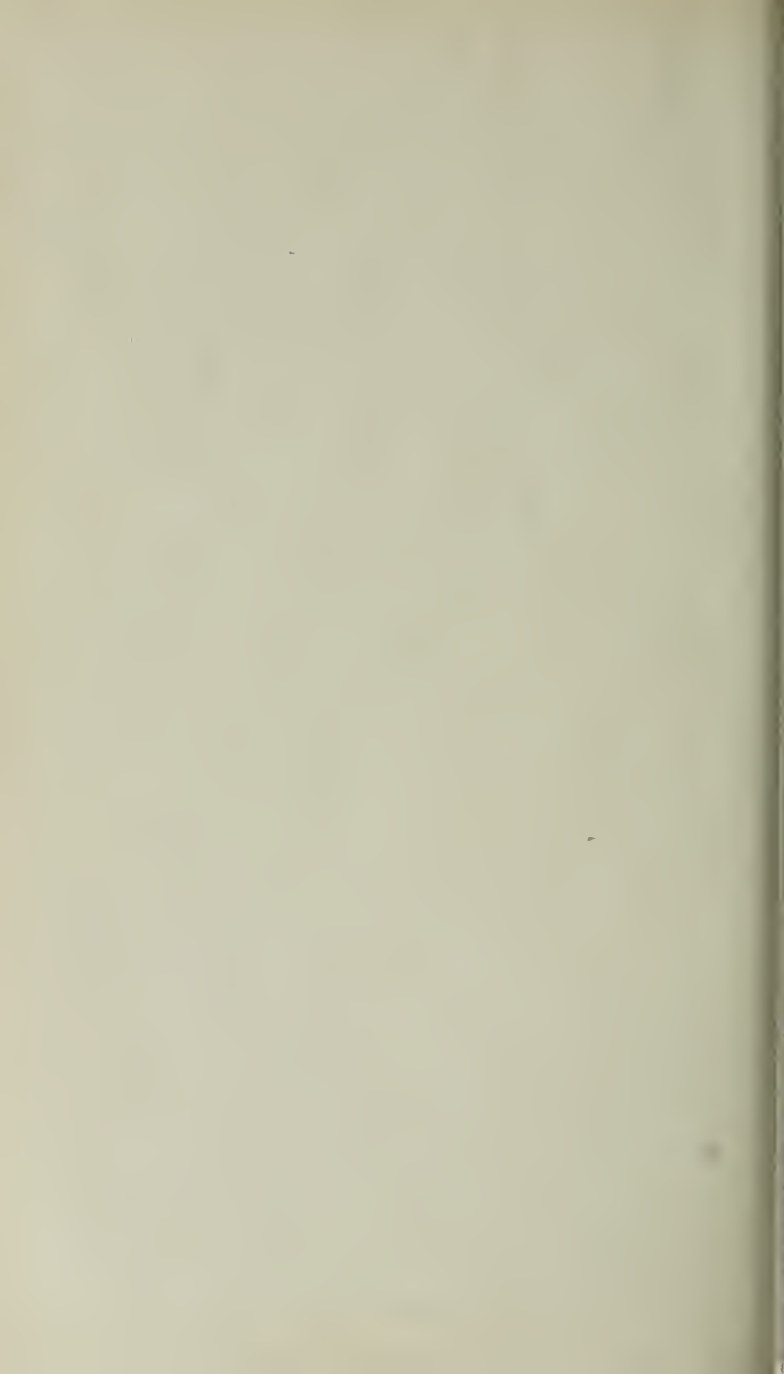
No. 11,784

Appeal from the District Court of the United States for the
 Northern District of California, Southern Division.

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Subject Index

	Page
Interest of Newspaper Publishers	1
The Facts	4
Legislative History of the Act and its Amendment	7
(a) The 1935 Situation	7
(b) The 1939 Situation	10
(c) The Situation Since 1939	11
The Supreme Court Decisions in the Silk and Greyvan Cases, When Stripped of Their Dicta, Set Out Sound Principles for the Determination of the Independent Contractor Rela- tionship	15
Misconceptions Affecting the Decision	18
The Court Is Not Bound by the Administrative Determination	23

Table of Authorities Cited

Cases	Pages
Bartels v. Birmingham and Geer v. Birmingham, 91 L. ed. (Adv. Op.), 1584 at 1587	25
Brewster v. Gage, 280 U. S. 327, 337 (1930)	13
Glenn v. Beard, (C.C.A. 6th, 1944), 141 F. (2d) 376.....	24
Grosjean v. American Press Co., 297 U. S. 233	41
Near v. Minnesota, 283 U. S. 697	41
Nevin, Inc. v. Rothensies, 58 Fed. Supp. 460, aff'd 151 Fed. (2d) 189	3, 24
U. S. v. Aberdeen Aerie No. 24 (C.C.A. 9th, 1945), 148 F. (2d) 655	24
U. S. v. Silk and Harrison v. Greyvan Lines (1947), 91 L. ed. (Adv. Op.) 1335, 1341, 1342	13, 15, 16, 18, 19, 21

Miscellaneous

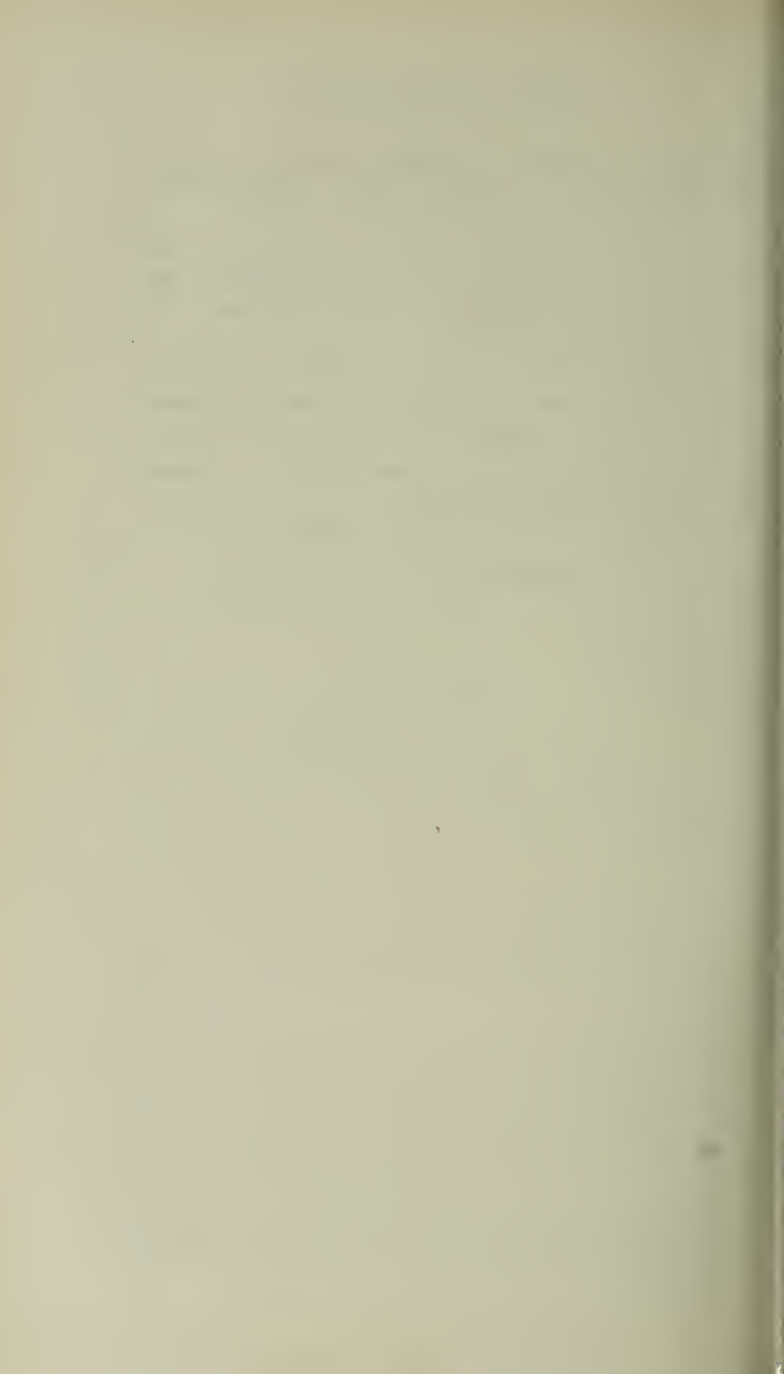
Treas. Reg. 90, promulgated under Title IX of the Social Security Act, Art. 205, 26 C.F.R. § 401.3.....	2, 11, 12
Testimony of Edwin E. Witte, Executive Director of the Committee for Economic Security, before the Committee on Finance, U. S. Senate, 74th Congress, First Session, on S. 1130, at pp. 32, 198, 199.....	8
Statement of Hon. Henry Morgenthau, Jr., Secretary of the Treasury, before the Committee on Economic Security contained in Hearings before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, p. 902	9
Statement of Abraham Epstein, Executive Secretary, American Assn. for Social Security, before the Committee on Economic Security, in hearings before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at p. 559	9, 10
Report #628 of Senate Committee on Finance on the Social Security Bill, before the 74th Congress, First Session, at p. 26	9

TABLE OF AUTHORITIES CITED

iii

Pages

Report of the Committee on Economic Security before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at p. 58	9
Statement of J. Douglas Brown, Director of Industrial Relations Section, Committee on Economic Security before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at pp. 240-41.....	10
Vol. I, Hearings relative to the Social Security Act Amendments of 1939 before the Committee on Ways and Means, 66th Congress, First Session, p. 6	10
Vol. II, Hearings relative to the Social Security Act Amendments of 1939 before the Committee on Ways and Means, 66th Congress, First Session, pp. 8, 22, 38.....	11
H. R. 6635, 76th Congress. Defeated by Senate	11, 12
53 Stat. 1	13
53 Stat. 175, 183	13
H. R. 4120	20



IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED, a corporation,	<i>Appellant,</i>	No. 11,781
vs.		No. 11,782
UNITED STATES OF AMERICA,	<i>Appellee.</i>	
THE CHRONICLE PUBLISHING COMPANY, a corporation,	<i>Appellant,</i>	No. 11,783
vs.		No. 11,784
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

AMICI CURIAE BRIEF OF PUBLISHERS.

INTEREST OF NEWSPAPER PUBLISHERS.

This amici curiae brief is filed pursuant to the order of this Court made January 28, 1948, granting petitioners' permission to file it, and is filed on behalf of publishers of daily newspapers published in various cities located in the Ninth Circuit. These publishers sell newspapers at wholesale rates to vendors who make a business of selling at retail such newspapers (and often other articles) to the public on city streets.

The issue in this case—whether such vendors are independent contractors and accordingly without the

provisions of Social Security legislation—is generally of prime interest to all newspaper publishers who make such wholesale sales to such retailers. Said Pacific Coast publishers believe that the views herein expressed are those of similarly circumstanced publishers located elsewhere in the United States.

Until the rendition of the judgment of the District Court herein, newspaper publishers generally held the view that vendors purchasing papers from them for resale to the public were not covered by the Social Security Act. They were aware that Congress in enacting the Social Security Act had refused to define who was an employee, thus impliedly being content with the common law conception; that in the hearings before the Congressional Committees it appeared that retailers and small tradesmen—such as the push-cart peddlers and other similarly self-employed persons—were not to be covered by the Act; and that it was then recognized that the legislation was still experimental and that there were serious administrative and collection difficulties with regard to them.

The publishers knew that the Regulation of the Federal Security Agency¹ contained practically the same definition of employee and independent contractor as prevailed at common law and that no substantial change in these regulations had been made since their promulgation shortly after the enactment of the Act, and that these regulations had been approved by Congress by the reenactment of pertinent provisions of

¹Treas. Reg. 90, promulgated under Title IX of the Social Security Act, Art. 205; see note 15.

the Act while these regulations were in effect. The newspapers also knew of the unsuccessful efforts of the Social Security Board to bring those engaged in retail trade within the coverage of the Act.²

The newspapers knew that although a period of twelve years had elapsed since the passage of the Act, the Internal Revenue Department, although it knew that the withholding income tax provisions of the Internal Revenue Code covered the same persons as the provisions of the Social Security Act, had made no claim that vendors were within the coverage of the Act or the Code, and had made no attempt to require income taxes to be withheld as to them. The publishers also knew that during this twelve year period no Court had held that vendors were covered by, or were ever intended to be covered by, the Social Security legislation.

Accordingly, newspapers were at a loss to understand the decision of the District Court herein, when in April 1947, it held that the vendors were employees within the coverage of the Social Security Act. They were unable to differentiate between retailers of merchandise (admittedly without the coverage of the Act) and vendors of newspapers. They were keenly aware that those engaged in the newspaper industry were beset by many unusual burdens—notably, the great losses caused by their inability to purchase newsprint; that many newspapers had been forced to suspend publication because of the inability to operate profit-

²*Nevin, Inc. v. Rothensics*, 58 Fed. Supp. 460, affirmed 151 Fed. (2d) 189.

ably; and that the Courts had been alert to protect those in the newspaper industry from unjust discrimination.³

THE FACTS.

Here, the vendors bought their papers at wholesale from newspaper publishers and sold them at retail to the public on the streets. They were adult persons. They negotiated with the publishers, through a Union acting for them as a buyers' representative, with regard to the wholesale price they were to pay for the newspapers and the retail price thereof, and with regard to the protection to be given them from certain kinds of newsboy competition, and to the places they were to carry on their businesses. These negotiations resulted in a contract between the publishers and the vendors (represented by the Union) and also individual contracts between each publisher and vendor. The parties therein agreed on types of corners at which the vendors should carry on their respective businesses; and provided that, when a place of business at a corner became vacant, the vendors' association would supply the publisher with a list of vendors who desired to engage in business at such corner, so

³*Near v. Minnesota*, 283 U. S. 697, in which the Court said:

"The newspapers, magazines and other journals [of the country, it is safe to say, have shed and continue to shed more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon mis-government, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with great concern." (See also *Grosjean v. American Press Co.*, 297 U. S. 233.)

that the vendor and the publisher could arrange for the setting up of business by the vendor at such location. They agreed that a vendor who had a contract for a corner was entitled to continue his place of business there, but that this contractual right could be terminated, in the event the vendor defaulted in the performance of the contract.

It appeared, both from the contract and the conduct of the parties, that the vendor alone had the right to specify, and did specify, the number of papers he would purchase; that the publisher had no right to control or direct—nor did he control or direct—the vendor as to the means or details through which the vendor's sales were effected. The publisher furnished the vendor with no place to work—the place where the vendor carried on his business was agreed upon by negotiations between vendor and publisher. The vendors bought at the wholesale price, agreed upon between the parties by negotiation, and sold at a retail price likewise agreed upon between them. Their profits were the difference between (a) the retail price which they received for the papers sold, and (b) the wholesale price of newspapers purchased by them less business losses through theft, damage by the elements and bad credit. The vendors were not required to, nor did they, receive orders or directions from the publishers, make reports to the publishers, or attend sales or other meetings with the publishers. Most of the vendors sold competitive newspapers. All of them had the right to sell, and over $\frac{1}{6}$ th of them sold—in addition to San Francisco newspapers—such items as

newspapers from other localities, books, racing forms, magazines, candies, chewing gum, cigars, cigarettes, pencils and similar articles. All vendors had a right to enlarge their businesses and a number of them did so—conducting retail stores from large stands from which they sold a variety of merchandise and commodities in addition to the above-described publications. Photographs of such stands were admitted in evidence.

When the vendors negotiated with the publishers, it was ascertained that, at certain locations at which the publishers desired sales outlets, the probable profit would be insufficient to induce the vendor to conduct his business there. Accordingly, the publishers guaranteed that the vendor's profit from the sale of newspapers would equal an agreed figure. On the average, the profits of the vendors at more than 80% of the locations exceeded the agreed figure. Therefore, less than 20% of the vendors were concerned with the guarantee.

Publishers' employees, called "wholesalers," were the only persons who had contact with the vendors on behalf of the publishers. These wholesalers did not control, and did not have the right to control, the vendors in any way. If they observed a default in the contract by the vendors, they reported it to the publishers. They delivered papers to the retailers, picked up unsold newspapers for which the vendor was entitled to credit, and collected the wholesale price from the vendors for the papers not returned. They gave no

orders to the vendors and were not authorized to do so.

The contract and the conduct of the parties shows that a seller-buyer relationship existed between them.

Generalizing: The vendors had the right to conduct their businesses as they saw fit, so that the energetic and ambitious could, and did, enlarge their profits, whereas those less energetic and less capable enjoyed smaller business success.

These vendors carried on their businesses in much the same manner as do the proprietors of flower stands, peanut stands, fruit stands, and merchandising stands who carry on their businesses in the streets of the cities and in the lobbies of hotels and office buildings.

LEGISLATIVE HISTORY OF THE ACT AND ITS AMENDMENT.

(a) The 1935 situation.

Both prior to and during the session of the 74th Congress in 1935, committees had made extensive studies with regard to the Social Security legislation. These studies and reports developed that large numbers of persons suffered from the insecurities of old age and the inability to be gainfully occupied; that these insecurities applied not only to all classes of industrial employees but also to small businessmen, to those who were self-employed, to those engaged in the professions and to those engaged in non-industrial

occupations such as farm laborers, domestics, teachers and governmental and institutional workers.⁴

Because of administrative, collection, and enforcement difficulties, small shopkeepers, merchants and businessmen, self-employed persons, farm laborers, professional people, domestics, teachers, governmental and institutional workers were all made ineligible under the Social Security legislation. Those in charge of the legislation described the situation as follows:

“* * * the administrative difficulties cannot be disregarded * * * It is desirable, in order to reduce pension costs, to include these other self-employed groups, but no effective method of collection from these self-employed groups has yet been devised anywhere in the world. * * * The employed group can be reached because we can collect from the employer and authorize him to deduct from the employee. It is again a question of administration. The desirability of bringing in the entire population is very evident, but the difficulties of doing it are such that we, as yet, do not know how we can bring in the self-employed.”⁵

“If these three classes of workers (casual laborers, domestic servants and agricultural workers) are to be included, however, the task may well prove insuperable—certainly at the outset. * * * we should greatly regret the imposition of admin-

⁴Testimony of Edwin E. Witte, Executive Director of the Committee for Economic Security, before the Committee on Finance, U. S. Senate, 74th Congress, First Session, on S. 1130, at p. 32.

⁵Testimony of Edwin E. Witte, Executive Director of the Committee for Economic Security, before the Committee on Finance, U. S. Senate, 74th Congress, First Session, on S. 1130, at pp. 198, 199.

istrative burdens in the bill that would threaten the continued operation of the entire system.”⁶

“You cannot make collections from farmers at this time. You cannot collect contributions from domestic servants. You cannot collect contributions from *push-cart peddlers and small-store proprietors*. It will cost you twice as much to collect as the amount of money that you will collect.” (Emphasis ours.)⁷

As a result, this legislation covered only about 25,804,000 out of 48,830,000 workers in gainful occupations—a less than 55% coverage.⁸

It was recognized that the 45% not covered (comprising the classes immediately above mentioned) would probably suffer from the insecurities of old-age and the inability to remain in gainful occupation to as great extent as those covered by the Act.

In these Committee discussions and reports, it was expressly stated that the following classes (amongst others) were not to be covered by the legislation: “proprietors, tenants, or the self-employed,⁹ farmers,

⁶Statement of Hon. Henry Morgenthau, Jr., Secretary of the Treasury, before the Committee on Economic Security contained in Hearings before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, p. 902.

⁷Statement of Abraham Epstein, Executive Secretary, American Association for Social Security, before the Committee on Economic Security, in Hearings before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at p. 559.

⁸Report No. 628 of Senate Committee on Finance on the Social Security Bill, before the 74th Congress, First Session, at p. 26.

⁹Report of the Committee on Economic Security before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at p. 58.

small shopkeepers, and housewives,¹⁰ push-cart peddlers and small-store proprietors".¹¹

According to the present Chairman of the Ways and Means Committee, those in charge of the legislation stated at the Committee meetings that news vendors were not covered by the legislation. But even in the absence of such assurance, the intention to exclude the street vendor from coverage was evident for he is a "small businessman", "a proprietor", "a small shopkeeper", "a tradesman", and in the same class as a "push-cart peddler".

(b) The 1939 situation.

At the Session of Congress held in 1939 Congressional Committees again studied the coverage of the Social Security Act. The report of Arthur J. Altmeier, Chairman of the Social Security Board, to the President and to the Congressional Committees, was to the effect that the Social Security legislation had covered only 50% of those gainfully occupied.¹²

¹⁰Statement of J. Douglas Brown, Director of Industrial Relations Section, Committee on Economic Security before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at pp. 240-41.

¹¹Statement of Abraham Epstein, Executive Secretary, American Assn. for Social Security, on Report of the Committee on Economic Security, in hearings before the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, at p. 559.

¹²Vol. I, Hearings relative to the Social Security Act Amendments of 1939 before the Committee on Ways and Means, 66th Congress, First Session, p. 6.

The Social Security Board did not attempt to directly extend coverage of the Social Security Act to self-employed persons or to businessmen.¹³

But the Social Security Board did attempt to extend the coverage of the Act to salesmen through enlarging the definition of the term "employee" in the Act to include persons other than employees under the common law. Congress defeated the Bill.¹⁴

(c) The situation since 1939.

The original Regulation¹⁵ recognizing the common

¹³The final report of the Advisory Council on Social Security stated:

"The Board has again studied the probability of including self-employed persons under the old-age insurance system. However, the Board is not prepared at this time to recommend what it considers a practical method of extending coverage to such persons. * * *" (p. 8.)

"A study should be made of the administration, legal and financial problems involved in the coverage of self-employed persons. * * *" (p. 22.)

"An important group outside of the existing program are those persons working on their own account, such as business and professional men, farmers and mechanics. * * *" (p. 38.)

Vol. II, Hearings relative to the Social Security Act Amendments of 1939 before Committee on Ways and Means, 66th Congress, First Session.

¹⁴H.R. 6635, 76th Congress. Defeated by Senate. See note 16.

¹⁵Treasury Regulation 90, promulgated under Title IX of the Social Security Act, Art. 205, provides in part:

"Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done * * * the right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an

law conception of "employee" and "independent contractor" still stand without any substantial change therein.

The Federal Security Agency had attempted to induce Congress to enlarge the definition but had been unsuccessful. Congress, in 1939, by its vote on H. R. 6635, had refused to broaden the law by redefining "employee" under the Social Security Act to include a "person who is not an employee * * * under law of master and servant" (the common law).¹⁶ Congress thereby made clear its intention that the common law conception of "employee" and "independent contractor" should continue to prevail. By thus appealing to Congress to enlarge the definition by legislation, the Agency, at that time, had recognized that the enlargement of the definition could be effected only by Congressional action.

Accordingly, the situation that existed at the time of the trial of this case was that Regulation 90, setting out the common law conception of "employee" was a regulation of long standing; had been in effect prior to 1939 when the Act was amended and at subsequent Congressional sessions when provisions of the Act had been reenacted. As a result the construction of

individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee * * *

(26 CFR § 400.205. See also Treasury Regulation 91, 26 CFR § 401.3.)

¹⁶H.R. 6635, 76th Congress. To redefine "employee" under the Social Security Act to include "a person who is not an employee of such person under the 'law of master and servant'." Defeated by Senate.

the Social Security Act contained in Regulation 90 had been adopted by Congress through the reenactment of the pertinent provisions of the Social Security statute while said Regulation was in effect.¹⁷

Moreover, it has been held that Regulation 90 was approved by Congress and, therefore, is in conformity with the law.

Under this regulation, which now has the force of law, the news vendors are not employees and are not covered by the Act.

A discussion of the legislative history of Social Security legislation would be incomplete without reference to the recent Supreme Court cases known as the *Greyvan* and *Silk* cases,¹⁸ where it was held that truckers were independent contractors without the coverage of the Social Security legislation.

We shall briefly discuss the dicta in the opinion.

It will be noted that the court stated that its attention had not been called to anything helpful in the "legislative history of the passage of the Act or the amendments thereto."¹⁹

The substance of this dicta is that the Social Security Act is to be liberally construed, giving regard to the "mischief to be corrected by the Act"; that the courts should take a realistic rather than a purely technical view of the relationship, but are not privi-

¹⁷53 Stats. 1; 53 Stats. 175, 183. See also *Brewster v. Gage*, 280 U. S. 327, 337 (1930).

¹⁸*U. S. v. Silk* and *Harrison v. Greyvan Lines*, 91 L. ed. (Adv. Op.) 1335.

¹⁹*Silk* opinion, *supra*, p. 1341.

leged to disregard the business arrangements between the parties, in determining their relationship.

It is evident that had the court's attention been called to the legislative history of the Act and its amendments, the views contained in the dicta would have been further clarified—particularly in regard to the National Labor Relations Act as compared to the Social Security Act.

After a study of such legislative history, the court necessarily would have concluded that the National Labor Relations Act was intended to benefit all classes which had to bargain as to wages, hours and working conditions with employers—the “mischief” in that case being “inequality of bargaining in controversies over wages, hours and working conditions.”

On the other hand, the court would have necessarily concluded that the Social Security Act was intended to cover only about 55% of the classes subject to the insecurities of old-age and the inability to obtain gainful occupations even though the “mischief” in this instance—the insecurities of old-age and the inability to be gainfully occupied—applied to practically everyone.

It is obvious that a study of the history of the Social Security Act will disclose that the attention of the legislators in enacting the legislation was directed particularly toward the fact that no relief was to be afforded to 45% of the persons who were subject to the insecurities of old-age and the lack of gainful employment; and that the legislators' attention was es-

pecially directed toward the classes of persons it was purposely omitting from coverage. Accordingly, had there been a study by the court of such legislative history in the *Greyvan* and *Silk* cases, the court would have decided that, in the first place, Congress intentionally omitted from the scope of the legislation large classes of persons “subject to the mischief”—such as the small shopkeepers, merchants and businessmen, self-employed persons, professional people, sharecroppers, independent contractors, push-cart peddlers and the like—and in the second place, specifically exempted from coverage certain types of employees—such as farm laborers, domestics, teachers, governmental and institutional workers, and the like.

When consideration is given to the legislative history of the Act and the amendments thereto and to the “mischief to be corrected” by the respective acts, the conclusion must necessarily be drawn that the vendors were intended to be and actually were without the coverage of the Social Security Act.

THE SUPREME COURT DECISION IN THE SILK AND GREYVAN CASES, WHEN STRIPPED OF THEIR DICTA, SET OUT SOUND PRINCIPLES FOR THE DETERMINATION OF THE INDEPENDENT CONTRACTOR RELATIONSHIP.

Since the *Silk* and *Greyvan* cases contain the latest expressions of the Supreme Court on the factors here to be considered in determining the independent contractor relationship, we will briefly consider the per-

herent portions of the decisions, particularly as applied to the undisputed facts in this case.

Under the *Silk* and *Greyvan* decisions, the facts must be viewed realistically and not technically, weight must be given to the long-standing Treasury Regulation 90 to the effect that a person is not an employee unless he is subject to the will and control of an employer, not only as to what shall be done but how it shall be done, and the court should also consider, amongst other factors, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation.

The Supreme Court further stressed that a realistic approach would not justify the changing by the court of any existing normal business relationship and that persons could be independent contractors even though their business was an integral part of larger business operations of an industry.

The Record in this case discloses that if consideration is given to the factors which the Supreme Court stated were important in the determination of the employee status, the vendors here are necessarily independent contractors.

The undisputed evidence shows that the publishers neither controlled the vendors nor had the right to control them as to how the functions of the vendors were to be carried out and that the only controls existing between the parties are those usually existing between a buyer and a seller. There is no evidence

here that the publishers dictated to, or had the right to dictate to, the vendors as to the details and means of selling their newspapers. The vendors could sell the newspapers in any manner they saw fit. It is a matter of common knowledge that newspaper vendors develop independent techniques and skill in selling, that there are many varieties of selling talk and approach, and that a vendor who is original, enterprising and industrious will make outstanding sales as compared to the less-enterprising and less-original vendor. Admittedly the proprietor of a lobby tobacco stand, selling cigarettes and other articles to the public, is an independent contractor and conducts his business in almost the identical way as does a news vendor. Each of these types of vendors controls, and has the exclusive right to control, the manner in which his own business operations are conducted.

The vendor's opportunity for profit also depends, in large part, upon his individual initiative, industry and ambition. Moreover, the vendor's opportunity to increase his profits is not limited to the sale of newspapers alone—he has the opportunity to expand his business. The alert vendor handles many lines of merchandise.

Similarly, his losses are due to his own course of conduct. Some losses are unavoidable. If, after delivery, his papers are stolen, he must bear the loss. If, as frequently happens in some cities, the newspapers are damaged or destroyed by rain, snow or other element, or are blown away by the wind, the loss is solely the vendor's. If the vendor has not used

good judgment in extending credit to customers, he alone must bear the burden of loss.

It is clear that the publishers do not limit the amount of profit of the respective vendors, that some vendors' profits are several times larger than those of others and that the patronage which a vendor builds up at a certain location through his own efforts is a valuable right, in the nature of good-will.

Admittedly, the investment of some vendors in facilities is not large. However, other vendors have rather elaborate stands and lay-outs. Obviously, the average vendor has a small business which does not require large capital. But neither is large capital required for a tobacco stand in a hotel lobby, or for a push-cart peddler, or for an owner of a street flower stand, or a street peanut vendor—all recognized as independent business men operating on a small scale and without large capital outlays.

The undisputed evidence shows that the vendor depends upon his own initiative, judgment and energy for a large part of his success.

We believe it is clear that an application of the tests suggested in the *Greyvan* and *Silk* cases inescapably leads to the conclusion that vendors are independent merchants.

MISCONCEPTIONS AFFECTING THE DECISION.

We believe that the opinion and findings disclose that the District Court misconceived some of the facts

of the case and that its reliance on such misconceptions led to erroneous conclusions.

One of the major misconceptions relates to the nature of the publishers' and the vendors' respective operations.

The opinion of the District Court states that the functions of the vendors are an integral part of the publisher's business (R. 46); that the publisher's function is to disseminate information and that the vendors in turn in selling the newspapers are not retailers but, on the contrary, are merely agents aiding the publisher in the dissemination of information (R. 39).

It is obvious that the sale of newspapers at retail can be regarded from several viewpoints and that one of these viewpoints could be that such sale is a service to a customer. It is clear that this conception is not the realistic and practical one which the Supreme Court has recently indicated must be entertained with regard to the Social Security Act.²⁰

A history of the legislation has shown a continuous policy of Congress against the extension of Social Security to transactions presenting serious administrative and collection problems.²¹

²⁰*U. S. v. Silk and Harrison v. Greyvan Lines*, 91 L. ed. (Adv. Ops.) 1335.

²¹It is to be recalled that in enacting this Act, the legislators purposely excluded persons in the class of small-store proprietors and push-cart peddlers because of difficulties of administration and collection. The following statement was made before the Committee on Economic Security in Hearings before the Committee on Ways and Means, House of Representatives, 74th Con-

An application of the District Court's theory that the transaction should be regarded solely as a service would present insuperable administrative and collection problems to wholesalers, vendors and the Agency.

It is recalled that vendors handle racing forms, local papers, "People's World," out-of-town papers, monthly and weekly magazines of endless variety, comic books and many other small articles. The vendor's arrangement with the publishers and wholesalers differ as to each of these publications. His margin of profit differs and the net profit differs, as to each.

None of the parties would find it possible to ascertain the amount of net profit or the amount of tax as to each publication. Clearly the publisher or wholesaler who has to make the return would be unable to determine the exact amount and it is equally obvious that the vendors with their limited knowledge of book-keeping and accounting could offer no assistance.

Thus the pursuit of the theory of the District Court—that under the Social Security Act the vendor's selling transactions must be regarded solely as a service—would lead to the administrative and collection difficulties which the legislators continuously have been seeking to avoid. The unreasonable result which would, of necessity, follow from the District Court's theory clearly indicates that its interpretation should be avoided.

gress, First Session, on H.R. 4120: "You cannot collect contributions from push-cart peddlers and small-store proprietors. It will cost you twice as much to collect as the amount of money that you will collect." (p. 559.)

It is obviously not the practical conception which the Supreme Court has indicated must be entertained.

We believe it is clear that, under the Social Security Act, the retail sale of the newspaper should not be regarded as the rendition of a service.

But even if the transaction should be regarded as the rendition of a service, this conception appears to be of no consequence since here the information was disseminated through the medium of independent contractors—just as merchandise sold in department stores is delivered by truckers acting as independent contractors.

It is clear, under the principles announced in the *Greyvan* and *Silk* cases, that—irrespective of whether a business operation is a service, or a manufacturing, selling or distribution process—a portion of the process can be and frequently is performed by independent contractors. Accordingly, even if it is assumed that the sale of newspapers by vendors can be regarded as the performance of an integral part of a distribution service, the vendors effecting such sales could be, and actually are, independent contractors. This principle is clearly stated in the *Greyvan* and *Silk* cases.²²

²²*U. S. v. Silk and Harrison v. Greyvan Lines*, 91 L. ed. (Adv. Ops.) 1335, in which the Court said:

“Of course, this does not mean that all who render service to an industry are employees. Compare *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 520, 70 L. ed. 384, 390, 46 S. Ct. 172. Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees. *The distributor who undertakes to market*

We believe that another cause for the District Court's erroneous conclusion was its conception that certain factors were indicative of an employee relationship—whereas, actually, such factors exist in the *usual* buyer and seller arrangement. In connection with this phase of the case, it should be borne in mind that all parties to the contract believed that, and the agreement between them was executed on the basis that, the vendors were independent contractors; that no effort was made to effect tax avoidance; and it is a cardinal principle that in enforcing the Act the normal business relationships should not be disturbed.

We have had an opportunity to examine the brief filed herein by Appellants. We share, and are fully in accord with, the views it expresses.

at his own risk the product of another, or the producer who agrees so to manufacture for another ordinarily cannot be said to have the employer-employee relationship. Production and distribution are different segments of business. The purposes of the legislation are not frustrated because the Government collects employment taxes from the distributor instead of the producer or the other way around." (p. 1341.)

"* * * There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social security taxes." (p. 1342.) (Emphasis ours.)

Appellants' brief fully discusses the relationship between the parties as disclosed by the Record, and a further discussion would be unnecessarily repetitious.

It is our belief that a study of the Record and Appellants' brief leads to the conclusion in this case that the usual incidents of an employee relationship are lacking and that the vendors must be regarded as retail merchants without the coverage of the Social Security Act.

**THE COURT IS NOT BOUND BY THE ADMINISTRATIVE
DETERMINATION.**

We wish to point out that this Court should attach no significance to the fact that, in this instance, the Federal Security Agency has made an administrative determination with regard to the vendors. There are many instances in the past where this Agency has made an administrative determination directly contrary to its own regulations, only to withdraw from the determination when it was disputed by the taxpayers in proceedings before the Agency or in the courts.

As we have shown in our discussion of the legislative history of the Act, Treasury Regulation 90, ever since its early promulgation, has limited the coverage of the Act to employees who were such under the master and servant doctrine; the Social Security Agency has failed in all of its repeated efforts to

change this regulation; and Congress has steadfastly refused its appeals to enlarge the definition of "employee". Actually, Congress has gone further, for it has adopted the construction of the Act contained in Treasury Regulation 90 by reenactment of the Act while the regulation was in effect.

Despite its knowledge of the above recited facts, the Agency, from time to time, has attempted indirectly, by *administrative* action, to enlarge the coverage of the Act beyond that permitted by the Act itself and by Treasury Regulation 90.

For example, despite the provision of the law and its own Regulation 90 excluding the self-employed, the Social Security Agency, by *administrative action*, has ruled that an independent worker making needlecraft articles at home was an employee;²³ and despite the statements in its own Regulation 90 that physicians, lawyers and others who follow an independent trade, business or profession are independent contractors, the Agency has ruled that a physician was within the coverage of the Act;²⁴ and in face of its own Regulation 90 that persons who follow an independent business are independent contractors, the Agency made an administrative determination that the owner of a retail store was not an independent contractor, but was an employee.²⁵

²³*Glenn v. Beard* (C.C.A. 6th, 1944), 141 F. (2d) 376.

²⁴*U. S. v. Aberdeen Aerie No. 24* (C.C.A. 9th Cir., 1945), 148 F. (2d) 655.

²⁵*Nevin, Inc. v. Rothensies*, 58 Fed. Supp. 460.

The Courts in all these cases held that the Commissioner went beyond the intent of the Act and acted in excess of his statutory authority.

It is equally significant that the Internal Revenue Bureau, which, with the Social Security Agency, is a branch of the Treasury Department, does not consider these vendors as employees. Although the Internal Revenue Bureau is charged with the administration of the withholding of income taxes under provisions which, as to coverage, are identical with those of the Social Security Act, the Bureau has never attempted to enforce with respect to vendors. Apparently the Bureau is convinced that Congress never intended vendors to be within the coverage of the Act.

We believe that the administrative determination here went far beyond the congressional intent and the statutory power of the Agency; and, using the language of the *Bartels* case, "We are of the opinion that such administrative action goes beyond routine and exceeds the statutory power of the Commissioner."²⁶

We respectfully urge that, in view of the legislative history of the Act and of the facts established by the record in this case, this Court determine that these

²⁶*Bartels v. Birmingham* and *Geer v. Birmingham*, 91 L. ed. (Adv. Op.) 1584, at 1587.

vendors are small businessmen and without the coverage of the Social Security Act.

Dated, March 15, 1948.

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Nos. 11,781, 11,782, 11,783, 11,784

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

vs.

UNITED STATES OF AMERICA,

Appellant,

No. 11,781

No. 11,782

Appellee.

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

vs.

UNITED STATES OF AMERICA,

Appellant,

No. 11,783

No. 11,784

Appellee.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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Subject Index

I.

Page

Appellee misconstrues the Silk and Greyvan cases..... 1

II.

Authorities cited by appellee 6

III.

Appellee's treatment of material factors 10

Control factor 11

Other relevant factors 15

IV.

Congressional intent 18

Conclusion 20

Table of Authorities Cited

Cases	Pages
Assoc. Indemnity Co. v. Ind. Acc. Comm., 115 Cal. App. 754, 2 P. (2d) 51	7
Balinski v. Press Publishing Co., 118 Pa. Supp. 89, 179 Atl. 897	7
Bartels v. Birmingham and Greer v. Birmingham, 91 L. ed. (Adv. Op.), 1584	18
Bernat v. Star Chronicle Pub. Co. (St. Louis Ct. App. 1935), 84 S. W. (2d) 429	7
Birmingham Post Co. v. Sturgeon, 227 Ala. 162, 149 So. 74 Bohanon v. James McClatchy Pub. Co., 16 C. A. (2d) 188, 60 P. (2d) 510	7 10
Creswell v. Charlotte News Pub. Co., 204 N. C. 380, 168 S. E. 408	7
Domarek v. Bates Motor Transport Lines (C.C.A. 7th Cir.), 93 F. (2d) 522	19
Emard v. Squire (D. Ct. Wash. 1945), 58 Supp. 281.....	6, 17
Gall v. Detroit Journal Co., 191 Mich. 405, 158 N. W. 36....	10
Hartford Acc. Indemnity Co. v. Ind. Acc. Comm., 123 Cal. App. 151, 10 P. (2d) 1035	7
Hearst Publications Inc. v. N.L.R.B. (C.C.A. 9th Cir.), 136 F. (2d) 608	2, 3, 5, 12
Henry Broderick, Inc. v. Squire (C.C.A. 9th Cir.), 163 F. (2d) 980	6
Luckenbach Steamship Company v. United States, 280 U. S. 173, 74 L. Ed. 356	19
In the Matter of The Kansas City Star Company, etc., 76 N.L.R.B. Case No. 17-R-1701, Feb. 26, 1948; Abstract of decision, 1 C.C.H. Lab. Law Rep., Par. 6369.....	5
Matter of Scotola, 282 N. Y. 689, 26 N. E. (2d) 815.....	8

TABLE OF AUTHORITIES CITED

iii

	Pages
New York Indemnity Co. v. Ind. Acc. Comm., 213 Cal. 43, 1 P. (2d) 12	7
Pacific Em. Ins. Co. v. Ind. Acc. Comm., 3 Cal. (2d) 759, 47 P. (2d) 270	7
Rathbun v. Payne, 21 C. A. (2d) 49, 68 P. (2d) 291.....	10
Ross v. Post Pub. Co., 129 Conn. 564, 29 A. (2d) 768.....	10
State Compensation Ins. Fund v. Ind. Acc. Comm., 216 Cal. 351, 14 P. (2d) 306	10
U. S. v. Silk and Harrison v. Greyvan Lines (1947), 91 L. ed. (Adv. Op.), 1335, 1341, 1342.....	5, 6, 17

Miscellaneous

3 P.H. Soc. Sec. Ser. (Georgia), Par. 27226.40.....	9
5 P.H. Soc. Sec. Ser. (Oregon), Par. 27226.40.....	10
6 P.H. Soc. Sec. Ser. (Utah), Par. 27226.13.....	10
6 P.H. Soc. Sec. Ser. (Washington), Par. 27226.40.....	10
1 C.C.H. Lab. Law Rep., Par. 8350.05.....	4
H. R. 5052	18

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED, a corporation,	<i>Appellant,</i>	No. 11,781
vs.		No. 11,782
UNITED STATES OF AMERICA,	<i>Appellee.</i>	
THE CHRONICLE PUBLISHING COMPANY, a corporation,	<i>Appellant,</i>	No. 11,783
vs.		No. 11,784
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

I.

APPELLEE MISCONSTRUES THE SILK AND GREYVAN CASES.

Like the Appellants, Appellee is basing its argument largely on the *Silk* and *Greyvan* cases. Unlike Appellants, however, it fails to consider the opinion in its entirety, uses only isolated dicta, and completely ignores what was actually decided, namely, that the truckers were independent contractors.

Typifying Appellee's misuse of dicta, is its adoption and application of the term "economic reality" as a criteria of great importance to be applied in all situations. It would be difficult to think of any expression more vague or requiring more care in its application and use for determining whether a person is an employee or an independent contractor. Whenever one engages in any activity, independent or otherwise, for his material advancement, the element of economic reality necessarily is present. The truckers in the *Greyvan* case were dependent on the Greyvan Company. They had no other business. They had no good will separate from the good will of the Greyvan Company, the name of which was painted on their trucks. Accordingly, the term "economic reality," as Appellee uses it, turns out to be little more than a catchy expression by which the social security administrators, notwithstanding the evident limitations of the law, seek to extend social security benefits—and burdens—to all who they think, as a matter of "economic reality," should have them. Obviously, such a philosophy has no bounds.

Appellee also places great reliance upon the *Hearst* case. The status of the vendors in that case was carefully considered by this Circuit Court and held by it to be that of independent contractors—a holding which this court observed was supported by the authorities (*Hearst Publications Inc. v. N.L.R.B.* (C.C.A. 9th Cir.), 136 F. (2d) 608). There was a dissenting opinion, but it was stated therein: "If I were free to draw my own inferences from the tes-

timony, I would decide that they were independent contractors, engaged in their own businesses on their respective spots." Thus, the reasoning of the dissent was that the court was bound by the Labor Board's finding. "The same reasoning explains the United States Supreme Court's reversal of this court in that case.

The Supreme Court, in its opinion in the *Hearst* case, says: "The record sustains the Board's findings and there is ample basis in the law for its conclusions." A cursory reading of this language might give the impression that the court concurred in the Board's findings. Apparently, the District Court drew this inference. A more careful analysis will show, however, that this is not so. The court went no further than to hold that the record sustained the Board's findings, meaning only there was some evidence in support thereof, and that, accepting these findings, there was ample basis in law for the Board's conclusion. Furthermore, it reasoned that it must give deference to the opinion of the Board in determining who were to be considered employees. The limited right of the courts to review the Labor Board's findings, as here illustrated, resulted in so many legally unassailable but ill-advised Board decisions that Congress, by the Taft-Hartley Law, amended the review provisions. The conference report makes it clear that the Supreme Court's decision in the *Hearst* case was one of the prompting causes of this amendment. It reads in part as follows:

“Under the language of section 10 (e) of the present act, findings of the Board, upon court review of Board orders, are conclusive ‘if supported by evidence.’ By reason of this language, the courts have, as one has put it, in effect, ‘abdicated’ to the Board (citing cases). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (*N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111) * * *”

1 C.C.H. Lab. Law Rep., Par. 8350.05).

Congress also believed that the Labor Board exceeded the proper limitations of the National Labor Relations Act in holding independent contractors to be employees thereunder. To prevent any repetition thereof, it also included in the Taft-Hartley Act a provision expressly excluding independent contractors from the definition of employees. Because of this amendment, the Board itself has since changed its position and held route carriers to be independent contractors. In so doing, it stated:

“Although we are persuaded that the facts in this proceeding are more nearly opposite to those in the *Philadelphia Record* case, we find it unnecessary, in view of the amended Act, to place any reliance on the reasoning in that case. The amended Act, as already noted, specifically excludes ‘independent contractors’ from the category of ‘employees.’ The legislative history, in this connection, shows that Congress intended

that the Board recognize as 'employees' those who 'work for wages or salaries under direct supervision,' and as 'independent contractors,' those who 'undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profit.'

"The aforesaid criteria, when applied to this case, clearly establish that these particular carriers are independent contractors."

(*In the Matter of The Kansas City Star Company, etc.*, 76 N.L.R.B. Case No. 17-R-1701, Feb. 26, 1948; Abstract of decision, 1 C.C.H. Lab. Law Rep., Par. 6369.)

From the foregoing, it appears that this Circuit Court's reasoning and decision in the *Hearst* case has been vindicated.

While it is not known what the Supreme Court would have done in the *Hearst* case had it been free to review the evidence, it is known what it did soon thereafter in the *Silk* and *Greyvan* cases. It held the truckers to be independent contractors, notwithstanding references made in its opinion to the *Hearst* case, and notwithstanding the dicta contained in its opinion to which Appellee seeks to attach so much importance. It would seem to follow from this that the meaning and significance which Appellee attributes to these references and dicta are without foundation and are in direct conflict with the Supreme Court's decisions.

In support of the inferences which it has drawn from the above mentioned Supreme Court decisions, Appellee cites the case of *Henry Broderick, Inc. v. Squire* (C.C.A. 9th Cir.), 163 F. (2d) 980. Appellee's reliance on this case is difficult to understand since it contains an interpretation of the *Silk* and *Greyvan* cases fully supporting that of Appellants. Among other things, it restates the proposition that Congress showed no intention to disturb normal business relationships, and, relying on the *Silk* and *Greyvan* cases, held the brokers there involved to be independent contractors. See also *Emard v. Squire* (D. Ct. Wash. 1945), 58 F. Supp. 281, where the Court held fishermen independent contractors under the Social Security Act notwithstanding the Supreme Court's decision in the *Hearst* case. Attention is particularly directed to that portion of the opinion on page 285 dealing with the *Hearst* case.

II.

AUTHORITIES CITED BY APPELLEE.

Among the mass of authorities cited by Appellee, there is no decision passing upon the status of vendors under the Social Security Act. The fact that the Act has been in effect since 1935, and that no cases have arisen thereunder concerning vendors, indicates that prior to the case here under appeal, vendors were considered by the social security administrators themselves to be independent contractors. It is also worthy of note that there are no decisions involving the status

of vendors under the federal income tax law requiring withholding from employees' wages.

Appellee, on page 22 of its brief, cites a number of cases which it states hold vendors to be employees. Actually, only one of the cases there cited concerns a street news vendor, and its facts differ so widely from those of the instant case that it is not in point. The case referred to is *Pacific Em. Ins. Co. v. Ind. Acc. Comm.*, 3 Cal. (2d) 759; 47 P. (2d) 270. There, the vendor's duties were to sell a publisher's newspaper exclusively and check in other vendors. For such service, if performed to the satisfaction of the district manager, he received 21½¢ a paper plus 50¢ bonus a day. Because of this special arrangement, in substance that of a supervised commission salesman, the ordinary rule in respect of vendors obtaining in California was not applicable.

While each case must be decided on its own facts, the conclusion reached in most cases involving street news vendors was that the vendors were independent contractors.¹ In fact, the prevailing rule relative to vendors was so well known that the vendors were advised by their union superiors and counsellors in 1937, when the first union contract with the publishers was

¹*New York Indemnity Co. v. Ind. Acc. Comm.*, 213 Cal. 43; 1 P. (2d) 12; *Assoc. Indemnity Co. v. Ind. Acc. Comm.*, 115 Cal. App. 754, 2 P. (2d) 51; *Hartford Acc. Indemnity Co. v. Ind. Acc. Comm.*, 123 Cal. App. 151, 10 P. (2d) 1035; *Balinski v. Press Publishing Co.*, 118 Pa. Sup. 89, 179 Atl. 897; *Bernat v. Star Chronicle Pub. Co.* (St. Louis Ct. App. 1935), 84 S.W. (2d) 429; *Creswell v. Charlotte News Pub. Co.*, 204 N.C. 380, 168 S.E. 408; *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162, 149 So. 74.

entered into, that the vendors were independent contractors. (R. 320-322).

The other cases cited by Appellee, purporting to cover vendors, actually cover what are known in the newspaper world as route carriers. Since these are persons who deliver newspapers to regular subscribers of the publishers, as distinguished from vendors who buy newspapers and sell them on the streets to the public, different considerations are presented, and the cases are of little assistance in determining a vendor case. The distinction between the route carrier and the vendor is succinctly made in one of the cases which Appellee has cited, namely, the *Matter of Scotola*, 282 N.Y. 689, 26 N.E. (2d) 815. There, the decision appealed from contained the following statement:

“The relation between this carrier and publisher differs from that of a newsboy who purchases papers and sells them on the street corner through crying his wares. While this carrier paid the appellant’s inspector for the papers which he delivered, his ownership was qualified, as they could be used only in fulfilling the publisher’s contract with its subscribers and in furthering the effort of the publisher to obtain new subscribers.”

Although Appellee cites a route carrier case from Georgia, a similar distinction is made in an opinion of the General Counsel of that state, as follows:

“It is universally held that a street news boy selling daily papers on the streets of a big city is

not an employee. It is the custom of such boys to purchase from the publisher a stipulated number of papers at a price less than the sale price on the streets. He makes a profit on the sale of the newspapers purchased by him from the purchaser (sic, publisher) but is under no obligations or direction on the part of the publisher and is, therefore, deemed to be an independent contractor.

“News boys who deliver papers to homes are, however, employees of the publisher. These carriers do not purchase papers from the publisher. They usually work on commission. They are required by the publisher to deliver papers at a certain time and on a certain route to certain homes designated by the publisher within certain limitations as to time and upon a schedule of prices fixed by the publisher. These delivery boys are under the actual control of the publisher and are, therefore, not deemed to be independent contractors. (Digest U.C.B. Gen. Counsel op. 3-1-38.)”

(3 P.H. Soc. Sec. Ser., Georgia, Par. 27226.40.)

Further, the Utah, Washington, and Oregon cases all involved an Unemployment Compensation Act which, unlike the Federal Act, contains a broad definition of employee and creates a statutory presumption that persons rendering services are employees unless the taxpayer can prove otherwise by establishing certain specified requirements to the satisfaction of the administrative agency. Because of the interpretation given to the broad statutory definition of employees

by the cases Appellee relies upon, Oregon and Utah each passed a law exempting route carriers. (5 P.H. Soc. Sec. Ser. (Oregon), Par. 27226.40, 6 P.H. Soc. Sec. Ser. (Utah), Par. 27226.13. A Washington decision subsequent to the one relied upon by Appellee held route carriers to be independent contractors. The situation was thereafter clarified in that state by enactment of a similar specific exemption (6 P.H. Soc. Sec. Ser. (Washington), Par. 27226.40). Even though a distinction may be made between vendors and route carriers, in most instances the court has concluded that route carriers are independent contractors.²

No useful purpose can be served by considering the many other cases cited by Appellee involving various types of salesmen and entirely dissimilar fact situations.

III.

APPELLEE'S TREATMENT OF MATERIAL FACTORS.

At pages 17-30 of Appellants' opening brief, it was developed that the District Court erred by relying on facts unsupported by the record and, in some instances, contrary to its own findings, and also by attaching undue significance to certain facts while dis-

²*Ross v. Post Pub. Co.*, 129 Conn. 564, 29 A. (2d) 768; *Gall v. Detroit Journal Co.*, 191 Mich. 405, 158 N.W. 36; *State Compensation Ins. Fund v. Ind. Acc. Comm.*, 216 Cal. 351, 14 P. (2d) 306; *Bohanon v. James McClatchy Pub. Co.*, 16 C.A. (2d) 188, 60 P. (2d) 510; *Rathbun v. Payne*, 21 C.A. (2d) 49, 68 P. (2d) 291.

missing other important ones as mere details. Appellee's answer to Appellants' attack on these unsupported findings consists chiefly of no more than a reference to the findings themselves, and its answer to Appellants' attack on the lower court's reasoning is limited to a mere repetition of such reasoning.

Control Factor.

Appellants attacked the inference drawn by the District Court that control was exercised by the publisher through selecting vendors, fixing or shifting their places of work, and discontinuing sales to the vendor. Appellants pointed out that a publisher did not contract with a vendor in respect to a corner thereafter to be designated by the publisher, but with respect to a then specified corner; that once the contract was made the publisher *could not* transfer the vendor or discontinue sales to him except for cause; and that the District Court expressly had so found (R. 27, Appellants' brief 22). The court's correct finding in this respect undoubtedly was based on the broad arbitration clause in the contract (Appellants' brief, Appendix III, sec. 36), and the testimony of the only witnesses in this respect (R. 190-3, R. 344). It was also pointed out in Appellants' brief that, while the publisher could discontinue a corner, by so doing it lost its retail outlet at that corner, a consequence which operated to prevent any abuse of the right; and, further, that such right to discontinue sales was typical of the buyer-seller relationship. Appellee deals with Appellants' contentions on pages 27,

28, and 41 of its brief. After repeating on page 27 its inferences and reasoning, Appellee contends on page 41 that the right to discontinue sales is tantamount to the right to terminate. On page 28, it says:

“Lastly, it must be recognized *realistically* that in the publisher’s right to terminate the relationship *for cause* or their right to designate locations and transfer a vendor from one location to another, [a transfer also could be made only for cause, as the court found] there was implicit considerable power of control.” (Emphasis added.)

Such reasoning has no support in the law. See Judge Hand’s opinion cited in this connection on page 23 of Appellants’ opening brief, also this court’s opinion in the *Hearst* case.

Appellants’ contention that the court erred in finding that the publishers fixed the vendors’ profits is actually supported by the assertion (page 27, Appellee’s brief) that the contract between the parties fixed the wholesale and retail price of the papers. This is the fact. The price between every buyer and seller is a matter of contract.

Appellee then adds (page 27 of its brief) that the publisher controlled the number of newspapers delivered to a vendor. In support thereof, only the court’s finding (R. 69) is cited. However, the court’s finding, while ambiguous, is not to this effect. It is that the number of newspapers delivered at a corner was the number estimated to be needed; that any disagreement as to the number was a matter for settlement be-

tween the publisher and the Union. Moreover, Appellants contend that the testimony on this point establishes the statement made in Appellants' brief (page 4) that the vendors were entitled to receive, and did receive, the number they specified (R. 182), the only qualification being the fact that the number of the first edition delivered was what was shown by experience to be needed.

Appellee urges as another element of alleged control (pages 28 and 43 of its brief) that the vendors were required to return unsold newspapers and, hence, that title thereto did not pass to the vendors.

Appellee's argument in this respect is based on a misleading quotation of the contract. Appellee quotes (page 44) as a complete sentence the first part set forth below but leaves out the balance of the sentence, namely, the part set forth in italics:

"All unsold complete newspapers shall be returned to the Publisher's representative in accordance with the requirements of the Publisher, *and if so returned by the News Vendor to whom they were sold by the Publisher, shall be credited to such News Vendor at the wholesale price, such credit to be given at the settlement of each day's sales.*" (Appellants' Opening Brief, Appendix III, sec. 19.)

The same section then sets forth an interpretive clause covering the quoted provision and provides in substance that the vendor is entitled to have credit if he returns unsold papers under certain conditions.

Thus, it is evident that the vendor is given a qualified right to return unsold papers, and that the only mandate of the word "shall" is that if he wishes to receive credit he must return the papers in accordance with the requirements of the publisher and not when and as he himself may choose.

After enumerating other so-called control elements, the irrelevancy of which was pointed out in the Appellants' opening brief, Appellee, after conceding (page 30 of its brief) that it may be true that the vendors were free from detailed control, asserts that excerpts from certain corner complaints showed who was boss. The excerpts show that a wholesaler on occasion checked a man in, i.e., collected from him, and refused further deliveries because he was drunk. This indicates only that the wholesaler was doing what any prudent person charged with the duty of delivering papers to vendors and collecting therefor should have done. When the wholesalers asked the publishers to take action for cause, they were prompted by failure of one kind or another on the part of the vendor properly to fulfill his contract. The very fact that the wholesalers went to the publishers with these complaints demonstrates that they had no disciplinary power. Whenever a wholesaler attempted to discipline a vendor, or otherwise exert control over him, he did so in violation of his instructions and in excess of his authority (R. 344). The witness Parrish clearly described this situation in somewhat informal, but, nevertheless unambiguous, language (R. 191). Isolated instances of such conduct do not change the true

nature of the status of the vendors. Moreover, Appellee does not contend, nor does the record show, that any action was ever taken by the publishers on any of these complaints. It does show, however, that a wholesaler was discharged for attempting to exercise control (R. 191).

Argument of Appellee to the effect that control was unnecessary and, hence, the lack of it not material, that supervision, sales meetings, and vendor reports were unnecessary and, hence, irrelevant considerations, and that there is only one way physically to sell a newspaper, only serves to demonstrate the lack of understanding which Appellee has of the small but independent merchant. Appellants submit that where a man contracts for a street location for the sale of papers, determines by contract the price he pays therefor, is free to sell the papers he buys, together with any other commodities which he may choose to sell, all free from supervision and in his own way, accounting to no one except for the cost of his merchandise, dependent entirely on his own initiative as to the variety and quantity of articles he sells and the profit he thereby makes for himself—he is an independent contractor of a type long and well established—a street merchant.

Other Relevant Factors.

What has just been said—and developed at length in Appellants' opening brief—makes an extended reply to Appellee's treatment of the other factors unnecessary. Appellants repeat that small merchants

who desire to act as such and to maintain their independence are no less operating on their own account because their investment is comparatively small and their risks (except as to their own time) not great. Theirs is not a business requiring great skill or large capital investment, but it is a business depending in part on good will and requiring initiative. That the degree of initiative displayed ranges from those who sell one paper to those who sell two or more and, finally, to those who maintain large news stands where many articles are sold is typical of all forms of independent business endeavor.

The fact that a certain minimum of earnings was guaranteed is of no relevance, and the District Court very properly attached no significance to it. As explained on page 5 of Appellants' opening brief, the publishers, in developing new territories, sometimes found it necessary to guarantee that the vendors would at least earn a minimum amount each week (R. 135). The minimums were low and designed to take care of such situations. While the guarantee is contained in the Union contract and, hence, in terms, is applicable to all, the number of vendors whose earnings did not exceed the guarantee varied from as low as 8% to 30%, depending on the newspaper and the period of time in question (R. 349, 446, 467, and 468). Such guarantees are commonly given to various types of independent distributors or operators, particularly in developing new territory. Appellee makes a reference to bonuses (also in the nature of guarantees),

but no bonuses were paid or provided for during the period in question.

Appellee urges that the fact that the vendors formed a Union which was affiliated with the American Federation of Labor is an indication that they were employees. Appellants submit that it is not. The truckers held to be independent contractors in the *Greyvan* case were members of a union, and worked under a contract between the company and the union. The same was true of salmon fishermen who were held to be independent contractors. (*Emard v. Squire*, supra.) It is not uncommon for independent operators to combine to increase their bargaining power. A conspicuous example is the farmers' association or co-op.

It is, nevertheless, material that the vendors were represented by a powerful Union, and that under its advice and guidance a contract creating the buyer-seller relationship was entered into. Whatever motive the Union may have had in so doing, its presence in this proceedings throughout should leave no doubt that the Union here concerned believes that the interests of its members will best be served by maintaining the independent relationship. If it is the vendors' desire to remain independent, as it is, and the desire of the publishers that the vendors shall remain independent, as it is, their common desire should be respected. The contract of the parties in this case is no subterfuge as was the one the social security admin-

istrator tried to uphold in the *Bartels* case. The fact that the Union was a party to the contract makes it evident that the parties were dealing at arm's length.

IV.

CONGRESSIONAL INTENT.

In their opening brief, Appellants pointed out, by reference to the history of social security legislation and by analogy of reasoning from Congressional action taken as a result of the Labor Board's ruling in the *Hearst* case, that Congress never intended the word "employee," as used in the social security laws, to be construed other than in its ordinary sense, and hence, that Congress never intended that the social security laws should be applied to vendors who buy newspapers and sell them at retail.

Since the filing of that brief, Congress has acted again. By an overwhelming vote (See vote tabulation at bottom of Appendix I), it passed, over the President's veto, H. R. 5052, an amendment specifically exempting services performed by an individual who sells newspapers "to ultimate consumers, under an arrangement under which the newspapers * * * are to be sold by him at a fixed price his compensation being based on the retention of the excess of such price over the amount at which the newspapers * * * are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service,

or is entitled to be credited with the unsold newspapers * * * turned back." (Appendix I.)

This amendment was enacted because of the District Court's decision here on appeal, and for the purpose of clarifying the employer-employee status of newspaper vendors for social security purposes. (See Report of Committee on Ways and Means, Appendix II.)

The enactment of this amendment is conclusive proof of what has always been apparent, except to those seeking by administrative fiat to enlarge the scope of social security, namely, that vendors buying newspapers and retailing them to the public were never intended by Congress to be classified as employees under social security. Accordingly, the assessment of social security taxes with respect to the vendors here involved, and the approval of that assessment by the District Court in this case, violated Congressional intent; and was an unauthorized administrative and judicial trespass upon legislative prerogative.

It is established that this court may consider the amendment made to the social security laws by H. R. 5052 for the purpose of discovering the intention behind, and, hence, the meaning of, the social security laws as originally enacted. (*Domarek v. Bates Motor Transport Lines* (C.C.A. 7th Cir.) 93 F. (2d) 522; *Luckenbach Steamship Company v. United States*, 280 U.S. 173, 74 L. Ed. 356.)

CONCLUSION.

Appellants desire to make it clear that their position in this case is not to be understood as being opposed in principle to the extension of social security benefits to whatever extent may be deemed advisable. However, they are strongly opposed to any extension except by orderly and well considered legislative action embodying adequate provision for administrative procedure if the self-employed are to be included. In no other way can the confusion which would otherwise result be avoided, and in no other way can the checks and balances, fundamental to the American form of government, be preserved.

Dated, San Francisco, California,
April 28, 1948.

REGINALD H. LINFORTH,
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Of Counsel.

(Appendices I and II Follow.)

Appendices.



Appendix I

80th CONGRESS
2d Session

H. R. 5052

IN THE HOUSE OF REPRESENTATIVES

A BILL

To exclude certain vendors of newspapers or magazines from certain provisions of the Social Security Act and Internal Revenue Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 209 (b) (15) of the Social Security Act, as amended (U.S.C., 1940 edition, Supp. V, title 42, sec. 409 (b) (15)), and section 1426 (b) (15) of the Internal Revenue Code, as amended, are hereby amended to read as follows:

“(15) (A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

“(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price his compensation being based on the retention of the excess of such price over the amount at which the

newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back; or”.

(b) The amendment made by subsection (a) to section 209 (b) (15) of the Social Security Act shall be applicable with respect to services performed after the date of the enactment of this Act, and the amendment made to section 1426 (b) (15) of the Internal Revenue Code shall be applicable with respect to services performed after December 31, 1939.

SEC. 2. (a) Section 1607 (c) (15) of the Internal Revenue Code, as amended, is hereby amended to read as follows:

“(15) (A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

“(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;”.

(b) The amendment made by subsection (a) shall be applicable with respect to services performed after December 31, 1939, and, as to services performed before July 1, 1946, shall be applied as if such amendment had been a part of section 1607 (c) (15) of the Internal Revenue Code as added to such code by section 614 of the Social Security Act Amendments of 1939.

SEC. 3. If any amount paid prior to the date of the enactment of this Act constitutes an overpayment of tax solely by reason of an amendment made by this Act, no refund or credit shall be made or allowed with respect to the amount of such overpayment.

March 5, 1948—Passed House of Representatives (unanimous).

March 24, 1948—Passed Senate (unanimous).

April 5, 1948—Vetoed by President Truman.

April 14, 1948—Veto overridden by House—307 to 28.

April 20, 1948—Veto overridden by Senate—77 to 7.

Appendix II

80th Congress) HOUSE OF REPRESENTATIVES (Report
2d Session) (No. 1320)

CLARIFYING EMPLOYER-EMPLOYEE STATUS OF CERTAIN
NEWSPAPER AND MAGAZINE VENDORS FOR
SOCIAL-SECURITY PURPOSES.

February 3, 1948.—Committed to the Committee of
the Whole House on the State of the Union
and ordered to be printed.

Mr. Gearhart, from the Committee on Ways and
Means, submitted the following

REPORT

(To accompany H. R. 5052)

The Committee on Ways and Means, to whom was referred the bill (H. B. 5052) to exclude certain vendors of newspapers or magazines from certain provisions of the Social Security Act and Internal Revenue Code, having considered the same, report favorably thereon and recommend that the bill do pass.

General Statement.

This bill seeks to clarify the coverage provisions of title II of the Social Security Act, as amended, and related taxing provisions found in the Internal Revenue Code as these requirements apply to the vendors of newspapers and magazines.

Whatever effect it may have on the extension or restriction of existing coverage provisions is purely incidental to its main purpose, which is the removal of a substantial area of ambiguity and confusion in the application of the coverage provisions of the act. The bill has the unqualified endorsement of the newspaper publishers, the vendors concerned, and their union representatives. A telegram recently received from an important news-vendors' union is attached to this report.

Under existing law, service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution, is specifically excluded from the type of employment covered by title II of the act. All other services for newspaper- or magazine-publishing firms, including that of delivery or distribution by individuals over the age of 18, were to be treated as giving rise to an employer-employee relationship or independent contractor relationship depending on the usual common-law tests.

One of the most difficult problems in the administration of these provisions of the law is the determination of who is and who is not an employee engaged in the sale or distribution of newspapers if the individuals concerned are over the age of 18. Coverage depends upon whether there is employment, but neither the term "employment" nor the terms "employer" and "employee" are precisely defined in the law.

Regardless of whether news vendors are or are not technically employees, under some decisions in recent cases, including a decision by one of the Federal district courts in California, involving certain vendors of newspapers, it has been held that the common-law tests, while thoroughly valid, are inadequate. The Government now contends that any type of service relationships constitutes employment for coverage purposes if it is not incidental to the pursuit of an independent calling, such as professional services rendered by lawyers, doctors, engineers, accountants, and the like. Obviously this raises the question of what is meant by "an independent calling."

The bill in question is not offered as the complete answer to the troublesome problem of defining employment or determining the existence of an employer-employee relationship. It simply provides that in the sale or distribution of newspapers and magazines under a contractual arrangement whereby sales are made at a fixed price, and compensation in whole or in part is measured by the excess of such price over the amount at which the newspapers or magazines are charged to the vendor, such vendor shall not be covered under title II of the Social Security Act regardless of whether he is guaranteed a minimum amount of compensation or credited with newspapers or magazines returned to his supplier.

The retail sales of newspapers and magazines, especially in our larger cities, is accomplished under unique and widely varying circumstances. A great many vendors, over the age of 18, commonly pur-

chase their papers with their own capital and become virtually free agents to dispose of them at will, retaining what they consider to be profits and not wages.

Your committee feels that an important factor in determining that newspaper and magazine vendors should be treated as independent contractors or persons otherwise pursuing an independent calling, is the fact that they deal as independent principles with their own customers and that their success depends in large measure upon the good will engendered by them among such patrons. This fact has been too frequently overlooked in recent years in ascertaining the status of many classes of working people as employees in the types of activities covered by the Social Security Act. In the case of vendors of published periodicals or other reading matter, the mere fact that the contractual right to return unsold goods at a given time exists (and this is a familiar practice among manufacturers and merchants as well) has little if any bearing on the ascertainment of the question of employment status.

Your committee is impressed with the fact that the vendors of newspapers and magazines are ordinarily free to sell other goods, wares, and merchandise, and frequently do; that they determine the way and the manner of offering the papers and magazines for sale; that they assume the risk of loss or destruction of papers or magazines which they are prevented from returning for credit; and that

their gains should be considered as profits from their own business rather than as wages for employment.

After hearing considerable testimony in a public hearing your committee believes that where the basic method of compensation is that described above, these vendors should not be treated as employees; that to consider them as employees of the publishing firms whose products they buy and sell produces a ridiculous and absurd rule with implications that could be construed so as to permit any person over the age of 18 selling the products of another, under like arrangements, to be considered the employee of the one supplying such articles or products. Such a rule would create an unconscionable administrative burden upon the Government and upon the business firms and individuals concerned.

Among other things, it would require every publishing house to withhold the required tax from the profits of every individual selling the product of that firm. News, information, and reading matter written for profit and offered for sale to any buyer, or distributed gratis, is, in the judgment of your committee, a commodity within certain obvious limitations. One who buys it and sells or distributes it for a profit even though conditions may be attached to the selling or distributing process, clearly should not be regarded as standing in an employer-employee relationship.

The requirement of the bill, that the services will not be excluded unless performed "at the time of" the sale to the ultimate consumer, was inserted to

make it clear that the exclusion was not to apply to a regional distributor whose services are antecedent to but not immediately part of the sale to the ultimate consumer. The insertion of the quoted words will not deny the exclusion although the vendor performs incidental services as a part of the sale, such as services in assembling newspapers and in taking them to the place of sale.

In order to avoid wiping out benefits and benefit rights which have already accrued and on which individuals may have placed reliance, the amendment to section 209 (b) (15) of the Social Security Act, relating to benefits under the old-age and survivors insurance system, is made effective with respect only to services performed after the enactment of the bill.

The amendments to the old-age and survivors insurance and unemployment taxing provisions in the Internal Revenue Code are applicable with respect to services performed after December 31, 1939. In the case of the unemployment tax, the bill provides that, as to services performed before July 1, 1946, the amendment shall operate in the same manner and have the same effect as if such amendment had been a part of section 1607 (c) (15) of the code as added to the code by section 614 of the Social Security Act amendments of 1939.

The bill prohibits any credit or refund of any amount paid prior to the date of enactment of this bill which constitutes an overpayment of tax solely by reason of an amendment made by this bill.

Your committee does not feel enactment of this legislation would in any way impair, hinder, or restrict the development or improvement of the present social-security system. On the contrary, by making it more exact in its terms and more easily administered, it will contribute to its added respect by the public and its efficiency in meeting the broad purposes of its establishment.

